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Revival of Comparative Jurisprudence

"A vital concern for the ideal of justice is what all legal systems most need today. The variety of legal systems need not trouble us; they are like different languages. Some languages are subtler or richer, some more logical or straightforward than others; but all serve the common purpose of communication. So all good legal systems, with their varying histories and environments, serve justice as their people see it; and the best of them serve the great tradition of government under law. But as languages can enrich and extend communication by translations and borrowings, so too can legal systems. The promotion of law in the world will therefore benefit from a revival of comparative jurisprudence, a revival in which American lawyers are already taking an active part.

. . . . . .

"It seems clear that this mutual interest and curiosity can profitably be carried much further. Moslem lands, for example, have old and well-developed legal systems about which American jurists know very little, as do Moslems about ours. An agreement among different cultures to exchange full information on basic points of comparative law—such as why, and under what conditions, a man may be jailed—should lead to considerable self-examination and improvement on all sides. In investigating why a thief may have his hand cut off in Saudi Arabia, or be branded on the forehead in other countries, we might also be led to study some debatable forms of punishment still used in some of our states. Habeas corpus, a right we regard as fundamental to a free society, is not so regarded in some other democracies; why not? Why are British court procedures so much more orderly and rapid than ours? To pursue such inquiries in a spirit of mutual truth-seeking could surely yield good results. All of us have much to teach and much to learn."*

EARL WARREN

The Chief Justice of the United States

* Reproduced by courtesy of the author and Time, Inc., from "The Law and the Future," 52 Fortune (November, 1955) 106, 229.

D. P. O'CONNELL

Unjust Enrichment

IT IS PERHAPS NOT TOO MUCH to suggest that the doctrine of unjust enrichment has been the area of one of the principal conflicts of modern English jurisprudence. The arguments for and against the existence of the doctrine in English law are merely expressions of the far deeper difference between that school of thought which seeks to expand the common law by reference to its ultimate ethico-juridical principles, and that which is content to contain it within certain clearly defined paths that permit of only limited deviation. The dichotomy of common law obligations into contract and tort is only relatively recent and largely accidental. There are many remedies provided by the law which lie outside the ambit of *consensus* or *delictum*, and which for the purposes of convenience have been catalogued within the past century or so under the inaccurate and meaningless heading of "quasi contract." This heading has been attached as an appendage to the law of contract, because it could not be conveniently fitted into any other category, and for this reason the unitary principle underlying the various quasi-contractual remedies has been obscured. The American *Restatement*[1] has sought to formulate this unitary principle as a generic head of law, of equal status with tort and contract, and has significantly designated it "restitution."

It is useful at the outset of this discussion to quote the formula adopted by the Restaters: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." This principle is said to depend for its validity "upon certain basic assumptions in regard to what is required by justice in the various situations." Thus, the moral basis of the remedies of quasi contract is frankly acknowledged, and the rules to be deduced from it are described as "general guides for conduct of the courts." In other words, the principle asserted in the *Restatement* constitutes an invitation to the judge to extend existing remedies, or even create new rules for new instances when justice in a very fundamental sense requires it. To that extent, the Restatement represents a reaction against the concept of "legal certainty," and what

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This article is the introduction to a series of lectures on Restitution delivered to the Adelaide Law School and the South Australian legal profession.

[1] Restatement of the Law of Restitution, American Law Institute (1937).

some would define as the "fetters of judicial precedent"; whether or not it accurately reflects the American decisions, it is at least indicative of the course which the common law might take in the future.[2]

Why should the Restatement be so significant, and why has it not been readily accepted as the guide which the common law might follow? Why is it that English Law, almost alone of European systems, has proved hesitant in adopting a principle so conformable to common sense and so obviously a part of the European legal heritage? The answer is to be found partly in the accidents of the common law development, and even more in recent times in the mentality of English lawyers.[3] The analytical character of English jurisprudence has caused undue emphasis to be placed on accumulation of decisions and dicta, so that in many aspects the common law would seem to be an amalgam of factual data rather than an epitome of values. The technique of the analytical jurist is to aggregate and expand precedent until there is enough of it to warrant a generalisation. When he approaches unjust enrichment, he tends to gather on one side all the statements in favor of the doctrine and balance them against a similar accumulation in opposition on the other. If he finds the scales even he expresses doubt, and so in effect makes his contribution to the negative balance. The result is quantitative rather than qualitative. With all due respect, the statement of Lord Porter in the House of Lords in *Reading v. A.-G.*[4] is only too characteristic of this approach. The question of unjust enrichment did not call for decision, but Lord Porter permitted himself the observation that "the exact status of the law of unjust enrichment is not yet assured." He was content for the purposes of the case, he said, "to accept the view that it forms no part of the Law of England." Lord Porter has weighed up the opposing dicta, found them evenly balanced, and so expressed doubt. Subsequent judges will employ the same process, but adding Lord Porter's dictum to the negative scale. And so it goes on, this erection of competing edifices, until one so overtops the other that it wins the day.

Is it not much more satisfactory to examine how sound is the ground on which the edifices rest? This means going beyond the self-imposed

[2] Lord Wright in 51 Harvard Law Review (1937) 369; Friedmann in 1 Modern Law Review (1937) 77; Seavey and Scott in 54 Law Quarterly Review (1938) 32; Arminjon, Nolde and Wolff, Traité de droit comparé (1952), vol. 3, p. 155.

[3] *Cf.* Seavey and Scott, *loc. cit.*, p. 32. Denning L. J. has illustrated how the Restatement can influence English Law in 37 American Bar Association Journal (1951) 329. He himself in the first hearing of Reading v. A.-G. accepted an argument of counsel based on the Restatement of Agency.

[4] [1951] A.C. 507 617, at p. 514. See also Boissevain v. Weil [1950] A.C. 327 per Lord Radcliffe, at p. 341; Ministry of Health v. Simpson [1951] A.C. 251 per Lord Simonds, at p. 275.

bounds of analytical jurisprudence. Unjust enrichment is not to be constructed empirically by the adding together of so many judicial pronouncements and the welding of them into a formula.[5] Rather is it to be understood as the enunciation of a precept lying on the borderland of law and ethics, and constituting the ultimate basis for diverse rules and decisions. In approaching the question of the existence or otherwise of the doctrine in English law, one must not only appreciate the character of the English legal system, but go further and recognize the essential unity of all European legal structures, a unity founded on the moral concord of Western peoples. This is one of the primary uses of comparative law.

In this context, a comparison of Blackstone,[6] Lord Mansfield, and Pothier is instructive. All three jurists were typical of their age in their belief that restitutionary remedies have their genesis in the natural law; all clearly intended to propound a doctrine of unjust enrichment in the most basic of terms. Indeed, it would have been surprising if Lord Mansfield, with his wide knowledge of continental law and his sympathy for the natural law tradition, had stated his case on quasi contract in any other way. As formulated by him, the law not merely gives a remedy where it implies a debt; it implies a debt where natural justice demands it. And the reason why a debt had to be implied was procedural and not substantive.[7] English law had no form of action for recovery of money in the absence of a contractual bond, trespass, or trover. A simple logical trick was therefore necessary: the law would assume a contractual bond where it was "unconscionable" for one to retain a benefit, and so what was intended to be essentially a restitutionary remedy founded on the broadest of moral principles was brought by the fiction of implied undertaking within the province of contract.

While the old forms of action survived, it was still necessary to frame restitutionary proceedings according to the technicalities of this implied

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[5] *Cf.* Winfield in 54 Law Quarterly Review (1938) 529.

[6] Implied contracts are such as "reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and, upon this presumption, makes him answerable;" and the common courts for work and labor "arise from natural reason, and the just construction of law." Comm. III, 158, 161.

[7] Moses v. Macferlan (1760) 2 Burr. 1005. Mansfield and his immediate successors tended to approach the question in terms of broad principle: Deering v. Winchelsea (1787), 2 B. & P. 270 at p. 272; Weston v. Downes (1778), 1 Doug. K. B. 23 at p. 24; Munt v. Stokes (1792) 4 Term. Rep. 561; Greville v. Da Costa (1797) Peake, Add. Cas. 113; Edwards v. Bates (1844) 7 Man. & C. 590; Kelly v. Solari (1841), 9 M. & W. 54; Foster v. Stewart (1814), 3 M. & S. 191; Marsack v. Webber (1860) 6 H. & N. 1; Freeman v. Jeffries (1869), L. R. 4 Ex. 189. See the 1868 edition of Bullen v. Leake on Pleadings, pp. 36, 44. On Mansfield's rationalization of quasi contract generally, see Fifoot, Lord Mansfield (1937) 246.

promise to repay. In due course, however, the technicalities came to obscure and even stifle the principle. The result was that quasi contract, instead of being an independent branch of the common law, continued to be annexed as sort of corollary to the law of contract, and as a consequence was greatly restricted in its scope. That this inhibiting process was contemporaneous with the attack on the natural law tradition is not without significance. The denial of the validity of universal propositions in the realm of philosophy involved in jurisprudence a denial of the validity of any general principles of justice from which specific rules of law might be deduced.

It was widely assumed that an obligation of law could arise only in virtue of an act of will manifested in the form either of an agreement to be bound or an intention or omission. Without such manifestation of the sovereign will of the individual there could be no obligation, and so a judge was assumed to have no mandate, in the absence of *consensus* or *delictum*, to create law. Especially must he avoid any resort to fundamental moral principles, since these, even if they were valid, were deemed to be beyond the scope of jurisprudence. It followed that in quasi contract one had to be able to imply a real promise to repay money or restore a benefit before the law would offer redress.[8] Lord Sumner's famous and crushing reference to Lord Mansfield in *Baylis v. Bishop of London*,[9] and his assumption in *Sinclair v. Brougham*[10] that the rationale of quasi contract is implied undertaking, are merely the most celebrated manifestations of this point of view.

Pothier has been accused of a similar narrowing down of the scope of restitution as it operated in Roman law[11] by adducing only two instances of it, namely the *condictio*, which he catalogues under *promutuum*, and *negotiorum gestio* which becomes *gestion d'affaires*. Pothier had no such intention. Natural law was the ultimate principle, and he was merely citing certain of the propositions to be deduced from it. He chose his principal examples from the post-glossators, and they were clearly not exclusive.[12] Having instanced the case of payment of a debt which the

[8] Pownal v. Ferrand (1827), 6 B. & C. 439, per Bayley J. at p. 444, Holroyd J. at p. 445 and Littledale J. at p. 446, referring to Exall v. Partridge (1799) 8 Term Rep. 308. But see Bonner v. Tottenham Building Society [1899] 1 Q.B. 161 at p. 166; Toussaint v. Martinnant (1787), 2 Term Rep. 100 at p. 104.

[9] [1913] 1 Ch. 127, at p. 140.

[10] [1914] A. C. 398.

[11] Inst. 3, 27; Gaius, 3, 91; Dig. 22, 3, 25; Hunter, Roman Law (1876), 657–66; Sherman, Roman Law in the Modern World (1917), vol. 2, p. 365; Friedmann in 16 Canadian Bar Review (1938) 247.

[12] The period that intervened between the post-glossators and the Age of Reason was not productive of any significant contribution to a theory of restitution. Jurists were more

payer did not owe but thought he owed, he says that there are many more examples, "*que nous passons sous silence.*"[13] The framers of the Code are the ones to incur blame if blame is to be imputed for narrowing the Roman law conception. Pothier was adopted as the model, and his illustrations became rubrics in their own right,[14] so that in the Code there is no general principle of unjust enrichment or restitution, and clearly there are many circumstances of enrichment not covered by the stated formulae. Were the French courts to be limited in their application of restitutionary remedies to matters that could be brought within the Code, or were they still entitled to invoke the more fundamental principle that underlay the *actio de in rem verso* as understood by the civilians? Their approach to this question is curiously parallel to that of the English courts to Lord Mansfield's proposition. In both countries, the onslaught of juridical positivism during the nineteenth century had the same constricting effect. In England, analytical jurisprudence, having resolved against any excursion beyond the boundaries of precedent, had to rely on fictions to rationalize the already existing rules of quasi contract. In France, the judicial process was confined to exegesis of the Code. Unless a plaintiff could anchor his case to one of the stated heads of restitution he was lost,[15] and doubtful cases could only be resolved by contorting the language of the Code.[16] Any tendency to use a garbled Code to secure

concerned with the techniques of customary and late-feudal law, and it was necessary to wait for the favorable climate of the 18th century to propound any doctrinaire thesis on the topic: Dawson, Unjust Enrichment (1951) 64. Domat in the late 17th century had discussed a concept of unjust enrichment as conformable to the Natural law (Lois Civiles, I, bk. II, tit. 7. sec. 1), but Pothier seems to have chosen his principal examples from the post-glossators, and notably Cujas, (Opera Omnia, III, c. 34, 214 (1758)), who had already made reference to natural justice as the basis of the Roman remedies.

[13] Oeuvres (Bugnet ed., 1890) Vol. 2, sec. 113. "Dans les contrats, c'est le consentement des parties contractantes qui produit l'obligation; dans les quasi contrats, il n'intervient aucun consentement, et c'est la loi seule ou l'équité naturelle qui produit l'obligation, en rendant obligatoire le fait d'où elle résulte." 114. See also 134 and 140, a restoration of property belonging to another. Generally see Dawson, *op. cit.*, p. 97.

[14] In Pothier, *op. cit.*, vol. 5, pt. III. Gestion d'affaires was specifically elevated to a head of law, with its own technical associations. (*Ibid.*, 167 *et seq.*) It became a matter of reciprocal obligation on the Roman law model (Code, Arts. 1372–1380); the negotiorum gestor is required to complete the undertaking and use care, and the person whose affair is managed must reimburse him; the matter therefore went beyond the mere moral obligation to compensate. Recovery of goods passed or money paid under mistake was likewise covered, and there are some thirteen other matters scattered throughout the Code which have a restitutionary flavor. The earliest commentators denied a doctrine of unjust enrichment: e.g., Toullier Droit Civil Français, vol. XI, No. 55, p. 65, and this was followed in S.37.2 330; S.50.1.257.

[15] Dawson, *op. cit.*, p. 98; David in 5 Cambridge Law Journal (1935) 205: Challies, The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec (2nd ed., 1952), Chap. IV; Arminjon etc., *op. cit.*, vol. 2, p. 78.

[16] In that year, the Court of Appeal at Rennes employed the actio de in rem verso to secure reimbursement from a husband where the latter's duty to support his wife had been dis-

compensation for enrichment through a third party's contract was, however, consistently suppressed by the Court of Cassation, although there was only one case which was decisively in favor of the rejection of any general principle of restitution,[17] and that case, in 1889, where relief was denied to a lender of money who paid off a first lien and thereby gave priority to a second lienor, was probably decided on the basis of the negligence of the payor.[18]

The trend towards the end of the century was away from a positivist approach and in favor of a return to the broad principles of Pothier. The decisive case was one which came before the Court of Cassation in 1892. The plaintiff had sold fertilizer to a farmer who was lessee of the defendant's land. The lease was cancelled after the fertilizer had been applied to the land, and the lessee was insolvent. The owner of the land was sued. No provision in the Code governed the situation. It was held that the action *de in rem verso* could be employed, and so a generic principle of restitution was elevated to rank equally with the Code. The Court made no attempt to disguise its resort to ethics in order to justify its decision: "*Attendu que cette action, dérivant du principe d'équité, qui défend de s'enrichir au détriment d'autrui, et n'ayant été réglementée par aucun texte de nos lois, son exercice n'est soumis à aucune condition determinée; qu' il suffit, pour la rendre recevable, que le demandeur allègue et offre d'établir l'existence d'un avantage qu'il aurait; par un sacrifice ou un fait personnel, procuré à celui contre lequel il agit.*" The decision is the more interesting in that it circumvented Article 1165, which provides that contracts do

charged by a third person, "founded on the fact that it is in the husband's interests that the debts were contracted." (Dalloz, Répertoire, vol. V, Contrat de Mariage. No. 1014) and in a well-known arrêt of the Court of Appeal at Pau in 1852, a schoolmaster was permitted to recover tuition fees from a pupil whose father was insolvent: (D.52.2.198. See D.69.2.213 (1869). Article 1376 was stretched to cover the situation.) The words "enrichissement au dépens d'autrui" appear in an arrêt of the Court of Appeal at Paris of 1850, where recovery of value of work done was allowed against an undisclosed principal: D. 54.5.483, where recovery was permitted against shipowners of money borrowed by a ship's officer and expended on the needs of the ship. In 1852 the mother of an illegitimate child was allowed a set-off against the child's estate for the cost of upbringing: D.P.53.2.181.

[17] S.50.1.257., S.53.1.209, actions against partnership for value of assets sold to one partner and transferred by him to the partnership; D.53.1.28, action for recovery of value of assets sold to lessee and left on land. Even at this elevated level, a liberalising of the requirements of semantics was by no means unknown; e.g., the Court of Cassation allowed recovery where a vendor of seed sold to a lessee and sowed by him on the defendant's land before cancellation of the lease. The case was brought under Art. 2102 which gives the owner preference on payment of sums due for seeds: ((1864) S.64.1.311). After 1870 more and more problems not directly covered by the restitutionary Articles in the Code came before the Court of Cassation (D.P. (1870) 71.1.240; (1873) D.73.1.451; (1877) D.78.1.204; (1888) D.88.1.310; (1889) D. 89.1.321; (1890) D. 91.1.49; (1891) S.92.1.92); (1871) S.71.2.76; (1872) S.72.2.222; (1875) S.75.1.362).

[18] S.90.1.97.

not affect or benefit third parties, and in effect created a right and corresponding obligation between one party to a contract and a third party, on the presupposition that the latter had been benefited.[19]

Stated as it was, the proposition of the Court of Cassation was too wide, and it invited a flood of actions in which attempts were made to expand the terms "enrichment" and the concept of "justice" to quite absurd limits. Accordingly in 1914, the Court of Cassation revised the formula in the following terms: "*Attendu que l'action de in rem verso, fondée sur le principe d'équité qui défend de s'enrichir au détriment d'autrui doit être admise dans tous les cas où, le patrimoine d'une personne se trouvant sans cause légitime enrichi aux dépens de celui d'une autre personne, cette dernière ne jouirait, pour obtenir ce qui lui est dû, d'aucune action naissant d'un contrat, d'un quasi-contract, d'un délit ou d'un quasi-délit.*"[20] Since then, the French courts, far from reversing the process instituted in 1892, have been concerned to refine the notion of *enrichissement sans cause* by defining, either by reference to positive provisions in the Code or to morality, the precise conditions of "*enrichissement*" and the concept of "*cause.*"[21]

There is no occasion to enter into a discussion of this process of refinement, which belongs exclusively to a study of French law; it suffices to note the intellectual atmosphere in which it is conducted. Every general principle has to be applied to contingent circumstances, and each application tends to generate rules which circumscribe the operation of the principle. This does not derogate from the validity of the principle or the recognition accorded to it. What is significant is that Lord Mansfield and Pothier both at the same time enunciated the identical proposition; and when it is noted that in the nineteenth century the Code in France played the same role in the judicial process as precedent in England, and when, in addition, one may perceive a parallel return to the 18th century formulation,[22] the analogy between the English and French approaches is very instructive in assessing the present position and function of unjust

[19] S.93.1.281. For Quebec cases, see Challies, *op. cit.*, Chap. 1.

[20] S.1918–19.1.41; D.P. 1920.1.102; An example of exaggerated claims is that of the financier who lent money for the construction of a railway to Arles and sought unsuccessfully to recover from the town on the ground that it was benefited by the railway's existence. D.95.1.391.

[21] In 1944, for example the Court of Cassation decided that the vendor of books could not recover against the ultimate possessor of the books because the price was excessive; the claim being immoral, the enrichment was not without cause. (Gaz. Pal. 1944.2.71) Also S.1941.1.121.

[22] The return to Lord Mansfield's formula in the Common Law began at the end of last century when Keener, under Dean Ames' inspiration, at Harvard, produced his work on Quasi Contract (1893) (See 2 Harvard Law Review (1888) 1). Woodward in 1913 carried the matter a good deal further: The Law of Quasi Contract (1913). For France see Ripert, La Règle Morale, No. 138, p. 257; Planiol and Ripert, Traité Pratique de Droit Civil Français (1931 ed.), vol. VII, No. 752, p. 47.

enrichment in English law. The French courts perhaps considered themselves until 1892 capable of extending a restitutionary remedy to cases not contemplated in the Code only by importing fictions analogous to the fictitious contract of Lord Sumner. The subterfuge was abandoned when the items in the Code were seen to be only so many instances of a general principle to which resort might be had when the instances failed to cover the situation.

The arguments against such a process of generalization in English law are threefold: First, the conservative approach that prefers precise rules and limitations within the traditional categories of quasi contract to the vagueness of universal major propositions—Holdsworth in particular, has been disturbed at the resurrected spectre of natural law; secondly, the contention that the fiction of implied contract became a rule of substantive law before the abolition of the common-law forms of action in 1852; and thirdly, that even if it is controversial that before 1852 implied contract was the substance of quasi contract, it was made such as a matter of *stare decisis* in *Sinclair v. Brougham*.[23] The first two arguments may be disposed of shortly. Lord Mansfield himself stated that as a "great friend" to the doctrine of unjust enrichment he would be careful to keep it within proper limits,[24] and the good sense of the judiciary in this respect may be supported by reference to the refining process of the French courts over the past forty years. One may disagree that the straining of logic to feign a contract is a "more specific and therefore less vague inquiry than to ask is it fair that the defendant should make a payment to the plaintiff," as Holdsworth puts it,[25] and may well consider that the disadvantages attendant on the law being influenced by rival philosophies of justice are slight, compared to the disadvantages of a common law inhibited by antiquated fictions in its capacity to expand. One may also disagree with Holdsworth's argument that implied contract was the basis of quasi contract. It is true that fictions have become substantive law,[26] but one cannot say that all fictions have, and in the case of the implied contract there is no evidence of this having occurred.[27] It is true that

[23] [1914] A.C. 398.

[24] Weston v. Downes, (1778) 1 Doug. 23, at p. 24.

[25] In 55 Law Quarterly Review (1939) 49. *Cf.* Challies, *op. cit.*, p. 44. Hanbury in 40 Law Quarterly Review (1924) 34.

[26] E.g., in the action of common recovery, the fiction that an estate tail cannot be barred completely without the consent of the protector of the settlement became a substantive law rule.

[27] Holdsworth (*loc. cit.*) p. 48 cites as authorities Sinclair v. Brougham and Re Simms, but as this paper strives to show neither case decided the point. To the contrary, we may cite Cockburn C. J. in Moule v. Garrett (1872) L.R. 7 Ex. 101, at p. 104; Lord Tenterden C.J. in Powr Ferrand (1827) 6 B. & C. 439.

before 1852, the law "raised a promise," but the question is why did it? The analytical mind is singularly indisposed to embark on the excursion outside the language of precedent which the question invites.

It is clear from the academic debate on unjust enrichment that *Sinclair v. Brougham* is the crux of the matter. A building society acted *ultra vires* in carrying on a banking business and accepting deposits. It went into liquidation, and, in effect, the shareholders sought to divide up the money of the depositors. The latter's action for money had and received was refused, but the equitable remedy of tracing the money was granted. It can be argued[28] that the discussion in that case on implied contract as the basis of quasi contract was in fact *obiter*, since the decision turned on the proposition that at common law the doctrine of *ultra vires* was not to be circumvented by the action for money had and received.[29] On this view of the case, it is immaterial that Lord Haldane accepted the dichotomy of common-law obligations into contract and tort and contended that the fiction of implied contract could only be set up if a real contract would have been valid if it existed. But the doctrine of *ultra vires* was in fact circumvented by the equitable remedy of tracing; does it not follow that the quasi-contractual remedy alone failed because the theory of implied contract was essential in the decision? The answer is that the equitable property remained in the depositors, and whereas the common law looked to the question whether property had passed, equity would follow the money if it could be earmarked or traced into assets. *Ultra vires* was therefore not in question in the equity suit.[30] The significant feature of the case is the Lords' clear striving for a remedy for injustice to the depositors;[31] a rule of positive law as to *ultra vires* excluded the common law remedy but not the equitable, and at least partial relief could be granted.

If this view of the case is sound, then *Sinclair v. Brougham* is not a bar to the construction of a generic doctrine of restitution.[32] This, how-

[28] *Cf.* Lord Wright in 6 Cambridge Law Journal (1938) 317; Fifoot, *op. cit.*, p. 246; Jackson, The History of Quasi Contract. (1936) 123.

[29] Lord Haldane at p. 415.

[30] The difficulty with this argument is that Lord Haldane described the doctrine of ultra vires as binding both at law and in equity: at p. 414.

[31] Lord Dunedin, e.g., at p. 431 said "all ideas of natural justice are against allowing A. to keep the property of B., which has somehow got into A.'s possession without any intention on the part of B. to make a gift to A." Quasi contract, he went on "is a contrivance which is introduced to meet an equitable idea." See also Lord Parker at p. 444.

[32] The contrary view underlies many subsequent dicta. E.g., Scrutton L.J. in Holt v. Markham [1923] 1. K.B. 605, at p. 513; as Fifoot puts it, he "rushed with eloquent enthusiasm to the support of the victors": *op. cit.*, p. 248; Atkinson J. in Transvaal Investment Co. v. Atkinson [1944] 1 All E.R. 579; Greene M.R. in Morgan v. Ashcroft [1938] 1 K.B. 49; but

ever, does not of itself establish the general principle. The arguments seeking to do so are ultimately reduced to two: that there are cases where quasi-contractual remedies have been granted where no contract could be implied, and that the doctrine is basic in European law. The one is an analytical argument, the other a jurisprudential. It is true that there are cases in which to import a contract would be to multiply fiction upon fiction. In *Craven-Ellis. v. Canons*,[33] the plaintiff and others purported to act as directors but without holding the requisite qualification shares. The plaintiff entered into an agreement of service between himself and the company, and pursuant to it rendered services, later taking action for his remuneration. The agreement was held to be void because it was made by directors lacking authority. The plaintiff nevertheless recovered on quantum meruit. How could a contract be implied when *ex hypothesi* there could be no contract? If implied contract is the basis of the action, it is necessary to assume that the law will so impute even when a real contract has been rejected. Such an assumption involves the further question: why will the law so impute?[34] And with that question unjust enrichment is invited back into the discussion. To maintain the "fanciful relationship" of contract in this situation is to adopt that position of legal antiquarianism which Lord Atkin so vigorously and picturesquely castigated in *United Australia Ltd. v. Barclays Bank*.[35]

It might well be added that the implied contract thesis was finally disposed of in the *Fibrosa Case*.[36] It is unnecessary to repeat the famous

see the judgments of Scott L.J. and Wynn Parry J. in Re Diplock's Estate [1947] 1 All E.R. 522 at p. 535, and on appeal [1948] 2 All E.R. 318. Also Halsbury (Hailsham) vol. 7, p. 276; Radcliffe in 54 Law Quarterly Review (1938) 24; Gutteridge in 5 Cambridge Law Journal (1935) 211; Hanbury in 40 Law Quarterly Review (1924) 36; Landon in 53 *ibid.* (1937) 303.

[33] [1936] 2 K.B. 403. See the comment of Friedmann in 53 Law Quarterly Review (1937) 449.

[34] Holdsworth has argued that the original contract being void a new one could be implied by the giving and acceptance of services. (55 Law Quarterly Review (1939) 49). Greer L.J., however, was careful to explain that the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the performance and acceptance of services: p. 411.

[35] [1941] A.C. 1. See the comment of Lord Wright in 57 Law Quarterly Review (1941) 184. Generally on the effect of abolition of the forms of action on quasi contract and the effect of fictions on the development of substantive law, see Maitland, Forms of Action at Common Law (1936 ed.) 79; Winfield in 53 Law Quarterly Review (1937) 449; 54 *ibid.*, p. 530; 55 *ibid.*, p. 161. Province and Function of Tort (1930) 119; The Law of Quasi Contract (1952) Chap. 1; Friedmann in 53 Law Quarterly Review (1937) 441; 1 Modern Law Review (1937) 77; 16 Canadian Bar Review (1938) 247; Lord Wright in 6 Cambridge Law Journal (1938) 305; Cheshire and Fifoot, The Law of Contract (3rd ed. 1952) 537; Jenks, Digest of English Civil Law (2nd ed., 1921) sect. 707.

[36] [1943] A.C. 32 at p. 61. But *cf.* Lord Macmillan at p. 59.

words of Lord Wright. He stated that to rely on *Sinclair v. Brougham* as having shut the door against unjust enrichment would be to reduce *ad absurdum* the doctrine of judicial precedent. A "notional or imputed promise to pay" is only a way of describing a debt or obligation arising by construction of law. In the *Fibrosa Case*, an English company agreed to sell and deliver within four months machinery to a company in Poland. A deposit was payable in advance, and its return was successfully sued for when the contract was frustrated by the German invasion of Poland. The money had been paid when due under an existing contract that was later frustrated. How then could it be recovered on any implied promise to repay? The construction of a hypothetical contract by supposing what terms the parties would have arrived at if they contemplated the future impossibility was not, in Lord Wright's opinion, the proper way of envisaging the matter. The action for money had and received rested on a debt imposed by the law, not constructed from the wills of the parties. And this involved the proposition that restitution is a "third category of the common law."[37]

This decision should be sufficient in itself to establish restitution as a generic doctrine and to indicate that the categories of quasi-contractual remedies are not closed. The use of the action in frustration was itself a novelty. The precedent has not, however, terminated the debate, nor has it been the starting point for any significant development. It is still argued that, even if an element of *aequum et bonum* is present whenever a quasi-contractual remedy is available, it does not follow that in every case of unjust enrichment an action in quasi contract lies.[38] This is a valid point, but it does not warrant the further conclusion that only

[37] *Cf.* his proposition in Brook's Wharf v. Goodman [1937] 1 K.B. 534, at p. 543 citing passages from Dawson v. Linton (1822) 5 B. & Ald. 521 and Pownal v. Ferrand (1827) 6 B. & C. 439. In this case the implied contract would have been totally artificial, where bonded warehousemen were compelled under statute to pay customs duties on cargo of others which had been stolen without fault of either party.

[38] Allen in 54 Law Quarterly Review (1938) 206. Also, Scott L.J. in Morgan v. Ashcroft [1938] 1 K.B.49, agreed that the implied contract in money had and received has no element of agreement about it, but he was equally free of doubt that "the moral principle of 'unjust enrichment' has now been rejected by English Courts as a universal or complete legal touchstone whereby to test this cause of action." But it is still important "to find some common positive principles upon which these causes of action called 'implied contracts' can be said to rest, and which will not altogether exclude that of unjust enrichment": at pp. 75–6. This, however, does not advance the discussion as to when a contract will be implied, which is the real question. A like criticism may be made of the judgment of Romer L.J. in Re Simms [1934] Ch. 1, at p. 31. where, after citing Sinclair v. Brougham, he stated that a promise to repay cannot be implied unless it is inequitable that the money be retained, but that the promise to be implied must be one which, having regard to the principles of the law of contract is legally possible.

where a contract can be implied will restitution be effected, nor does the existence of historically instanced exceptions derogate from the generality of the principle. There is, for example, the anomaly of infants' contracts. This category had emerged, on considerations of public policy, before the concept of unjust enrichment; it stands on its own special ground.[39] Even here, however, "natural justice" has been resorted to in order to

[39] In Cowern v. Nield [1912] 2 K.B. 419, it was held that an infant was able to keep both the goods he had contracted to sell and the money he had been paid for them. Two years later in Leslie v. Sheill [1914] 3 K.B. 607, an infant was able to keep money which he had obtained by entering into a contract upon misrepresenting his age. In both cases, the latter a Court of Appeal decision, the action for money had and received was rejected, and this would seem on its face, and indeed it was so argued by Professor Gutteridge, to be a repudiation of the concept of unjust enrichment. A moment's investigation of the history of the matter will dispose of this objection. The rule in Leslie v. Sheill appears in 1690 in Darby v. Boucher 1 Salk. 279, where Holt C.J. thought of the situation exclusively in terms of assumpsit, pointing out that "it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money." The matter would seem to have been disposed of in terms of general policy. That the situation is apposite for an unjust enrichment doctrine was, however, recognized in Marlow v. Pitfeild, (1719) 1 P. Wms. 558, and Harris v. Lee (1718) 1 P. Wms. 482, where equity was employed to make in the one case an infant, and in the other a husband, liable for necessaries. There is nothing in either case to limit the operation of the equitable relief to necessaries. (Bacon's Abridgement, IV, 356.) When, however, Lord Kenyon dealt in 1792 with the case of an infant who had, as an apprentice, overcharged his employers' customers and pocketed the balance, he held that an action for money had and received lay because the claim arose *ex delicto*, but that no action would lie if the claim had been *ex contractu*, clearly making reference to Lord Holt's decision: Bristow v. Eastman (1794) 1 Esp. 172. Out of this unhappy beginning, the text writers (Dicey on Parties, 284; Bullen & Leake, p. 605) and Victorian judges (e.g., In re Jones 18 Ch. D. 109) produced a rule of substantive law. Phillimore J. in Cowern v. Nield merely quoted Bristow v. Eastman and on the strength of it refused the claim. In Leslie v. Sheill, Lord Sumner found the rule already crystallized that the courts will not enforce in a roundabout way an unenforceable contract, but he fortified it with the argument (only, of course, to be expected in the light of what he had just previously had to say in Sinclair v. Brougham) that the law forbids a court to allow "under the name of an implied contract or in the form of an action quasi ex contractu, a proceeding to enforce part of a contract, which the statute (Infants Relief Act) declares to be wholly void." The equitable remedy he discussed at length. In Stocks v. Wilson the previous year ([1913] 2 K.B. 235), Lush J. applied an equitable principle of restitution on the basis that the infant could not both keep goods and not pay for them. The situation in Leslie v. Sheill Lord Sumner conceived to be different. There was no question of tracing the money paid over. The contract was a special type, a contract of loan, and the other judges argued that equity would not give effect indirectly to a void contract. The overriding principle in cases of infants' contracts is, therefore, that the contract shall not be enforced by resort to quasi-contractual remedies, so preventing infants from running into debt. It would have been sufficient for the infant's protection to have admitted as a limited defence a plea that the money had been used, and the rule as it has developed has thus been expanded further than principle required. Be that as it may, the rule clearly has no bearing on the existence of unjust enrichment in English law, but one may be pardoned for suggesting that the judicial thinking on the subject, being contained within the tight limits of contract, has produced a deplorable rule of law.

avoid some of the more startling consequences of the rule,[40] and unjust enrichment might well be the major premise in further development of this line of approach. Lord Wright has argued for an expansion of the category of necessaries to read down the implications of the law on infants' contracts as stated in *Leslie v. Sheill*.[41] He is probably unsound in his main proposition that contracts for necessaries are really quasi-contractual in character, since they were regarded as proper contracts long before the 18th century,[42] but his conclusions indicate the intellectual atmosphere which might favor a rationalization of the law on infants' contracts in the future.

Another instance of gap in the uniform law of restitution is the *negotiorum gestio* situation, but this is also to be explained on special grounds. In *Falcke v. Scottish Imperial Insurance Co.*,[43] the rule was fortified by the notion that obligation can arise only out of a concession of the will. Such a dogma seems to lurk behind Bowen L. J's proposition that "work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will." There is no logical distinction between the benefit created to real estate by the action of a volunteer, and that created by salvage at sea, yet the law denies compensation in the former case[44] and admits it under civilian influences in the latter.[45] Where a railway company failed to fulfil its duty to repair a bridge and the local corporation

[40] In Valentini v. Canali where an infant was not allowed to avoid liability for the benefit which he had derived from the tenancy of a house, on the ground that "where an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover the money which he has paid": (1889) 24 Q.B.D.166.

[41] 6 Cambridge Law Journal (1938) 319.

[42] In re Rhodes (1890) 44 Ch. 94, at p. 107, Lindley L.J. stated that the obligation to pay for necessaries does not arise from a real contract, but is one which "can be enforced as if it had a contractual origin." Also Fletcher Moulton L.J. in Nash v. Inman [1908] 2 K.B. 1. Holdsworth argues to the contrary that an infant's contract for necessaries is a valid contract (*loc. cit.*), and since the Infants' Relief Act, 1874, it would seem to be so. What its basis was at common law seems to be immaterial to the discussion of restitutionary remedies. It was inevitable that the courts and the writers from Manby v. Scott (1659) 1 Mod. 124 should speak of "contracts for necessaries" (Brooke v. Gally (1740) Barn. C.1; Peters v. Fleming (1840) 6 M. & W. 42; Ryder v. Wombwell (1868) L.R. 4 Ex. 32), since the matter was thought of in terms of procedure, and Winfield seems to be correct when he says it was uncertain if the basis of the action was contractual or quasi-contractual: in 58 Law Quarterly Review (1942) 82. The views held by Greer L. J. in Elkington v. Amery [1936] 2 All E.R. 86 at p. 88, and by Scrutton L.J. in Pontypridd Union v. Drew [1927] 1 K.B. 214, at p. 220 are irrelevant.

[43] (1886) 34 Ch. D. 234, at p. 248.

[44] Leigh v. Dickeson (1885) 15 Q.B.D. 60.

[45] Five Steel Barges (1890) 15 P.D. 142, at p. 146.

did so without instructions from the company, the corporation was held unable to recover the cost.[46] This unsatisfactory decision was arrived at by an approach from the point of view of contract and not from that of restitution. Woodward had no hesitation in rejecting it as unsound, and asserted that it was contrary to the common law as it had developed in the United States.[47] The distinction adopted by the Restaters between "officious" and "unofficious" conferring of benefits could well develop a restitutionary doctrine in this field based on the notions underlying *Brook's Wharf v. Goodman.*[48] A further point of comment on unjust enrichment in English law is the test of enrichment. In *Phillips v. Homfray*,[49] the plaintiff claimed compensation for the use of mine passages from the estate of a man who had wrongfully taken minerals from his farm. It was held that the assets of the deceased had not necessarily been swollen by what he had done. In effect, the proposition is that enrichment may be retained if it does not take the form either of an accretion of assets or a depletion of those of the plaintiff.

To argue, however, as some have done, that there is no principle of unjust enrichment in English law because there are only certain remedies and a number of gaps is to take a stand on the same ground as the early interpretators of the French Code.[50] If English law were really founded on the thesis that universal propositions have no validity, we would have to eliminate from it all references to "justice," "fairness," and "reasonableness," for no matter how disguised and subjective these may be they have a highly natural law content. The test, or one of the tests of unjust enrichment is the recognition, more or less constant, in judicial pronouncements involving restitutionary situations, of the fairness and justice of the case.[51] Quasi-contractual and some equitable remedies are the realization in law of the moral principle of restitution in the sphere

[46] Macclesfield Corporation v. Gt. Cen. Ry. [1911] 2 K.B. 528.

[47] The Law of Quasi Contract (1913), p. 334. See also the review in 30 Law Quarterly Review (1914) 244.

[48] [1937] 1 K.B. 534.

[49] (1883) 24 Ch. D. 439.

[50] Since 1892 the *de in rem verso* principle has been read down by Article 1165 which provides that contracts do not affect or benefit third parties, so that a rule of positive law excludes the moral claim in some cases. E.g., it has been held that a contractor who has worked for a tenant cannot sue the landlord to recover the benefit (D.P. 1923 1.64; D.P. 1920. 1. 102; D.P. 1912. 1. 217.) Nor can a laborer working for an insolvent contractor recover his wages from the latter's employer (D.P. 1899. 1. 105). But a usufructuary may sue for repairs done to the owner's property (S.30, 2.73) and where a woman who was joint owner with her children contracted for improvements it was held after she became insolvent that the children were liable on the ground that the estate had been enriched (D.P. 1911.1.377. See D.P. 1906, 2. 132).

[51] It is to be noted that in Re Diplock [1948] Ch. 465, at p. 480, substantial justice was achieved by the machinery of tracing money paid by trustees to "beneficiaries" on a mistaken interpretation of a will, and this despite the doubts expressed about unjust enrichment.

of commutative justice. The techniques by which restitution may be achieved may be defective and they may differ; they may have to be channelled along traditional lines;[52] and they may be subordinated to other remedies.[53] In German law, the general principle of unjust enrichment is used to go behind transactions formally completed but the purpose of which is unrealized.[54] It covers some of the situations covered by the doctrine of constructive trust and some classified under the doctrine of frustration,[55] and its function is to mitigate the hardships which would result in certain cases from an application of strict law by applying principles of justice and equity. The fairly constant pattern of operation of unjust enrichment through these various techniques may be seen as a manifestation of the substantial unity of European legal structures, which is in itself sufficient to prompt comparable juridical developments.[56] Given the appropriate attitude of mind, one is enabled to penetrate through the complex of disparate rules and exceptions in English law to a perception of their genesis, and so comprehend by reference to continental experience their true universality and their equally true limitations. The lawyer's sphere of competence is not thereby transcended, and he is perhaps justified in arriving at Denning L.J's position in *Nelson v. Larholt*,[57] when he referred to the inappropriateness of the distinction between law and equity and proposed that principles be stated in the light of their combined effect.

[52] For example, there is no restitution under a contract unenforceable by virtue of the operation of the Statutes of Frauds or Limitations.

[53] E.g., Article 2042 of the Italian Civil Code: "The action of enrichment is not available where the person who has suffered the loss can bring another action to make good the loss he has suffered." *Cf.* S. 1941. 1. 121.

[54] Section 812(1) of the Civil Code: "Whosoever acquires anything through the acts of another, or in any other way at that person's expense, without legal justification (*ohne rechtlichen Grund*) is bound to restore it to him. Such obligation shall also arise when the legal justification ceases to exist, or where the intended purpose of a legal transaction has not been achieved." There must be a detriment to the claimant, and this, when there is no legal justification, gives rise to a right to a restoration of the status quo ante, if this is possible. See Manual of German Law (H.M.S.O.), vol. 1 (1950) 97. See also Italian Civil Code, Art. 2041.

[55] E.g., where goods delivered under a contract for sale of future goods (*Werklieferungsvertrag*) have perished without fault of the buyer or seller the latter is obliged to refund a deposit. This has been applied also to confiscation. (Betriebsberater, 1952, 733); and cases where land is erroneously recorded (112 R.G.Z. 260). Achilles-Greif contends that there is no general action for unjust enrichment, only a number of actions which nevertheless cover most situations: Bürgerliches Gesetzbuch (19th ed., 1949), s. 385. See generally Gérota, La théorie de l'enrichissement sans cause dans le droit civil allemand (1925).

[56] Even Soviet Code, sections 399–400. See Gsovski, Soviet Civil Law (1949), vol. 2, p. 202. The Soviet test of enrichment differs from the German in requiring a restoration of the status quo ante (*ibid*, p. 206). German law requires restoration only of what has not been bona fide consumed.

[57] [1948] 1 K.B. 339.

A coherent system of unjust enrichment then will strive to assimilate under one generic principle a diversity of juridical situations. Whenever money has been paid or work done under a contract which has failed or was void *ab initio*, the factual situation has ethical implications. The party placed at an economic disadvantage has what Lord Mansfield would have described as an "equitable" interest in the benefit of the other party. Any civilized system, as Lord Wright has insisted,[58] must recognize the equities of the case and impute to the party enriched an obligation to restore the benefit or its economic equivalent. To this there will, of course, be exceptions, as in the case of a contract unenforceable by virtue of the Statutes of Frauds or Limitations, but it is still possible to perceive the common element in cases where the enrichment is occasioned by overpayment of a debt, by payment induced by fraud or by mistake of fact leading to performance of a supposed but nonexistent contract,[59] or by wrongful distribution by a trustee. It matters not whether the court regards the one enriched as personally liable to repay or as constructively a trustee of the acquired assets.[60] The net result is restitutionary in character, and the action for money had and received and that for a declaration of trust are merely alternative procedures appropriate to differing circumstances, the one personal, the other proprietary, but both generated by the same principle. The traditional divisions of English law were satisfactory so long as society was relatively static, but enormous economic and social changes invite a liberalizing of precedent and a striving for new remedies. This indicates that the chapter headings of contracts and trusts may have to be broken down into more general precepts that will recognize the intrinsic affinity of the problems arising in a diversity of situations and be acknowledged as the foundation of differing actions.[61]

[58] Fibrosa case (*supra*).

[59] But not mistake of law. The existence of this distinction highlights the nature of the restitutionary action. The line between mistake of law and mistake of fact is a very unstable one, and the courts have been quite casuistical in their efforts to characterize a mistake as one of fact in order to give a remedy: Bilbie v. Lumley (1802) 2 East 469; Holt v. Markham [1923] 1 K.B. 504; Norwich Fire Insurance Soc. Ltd. v. Price [1934] A.C.455.

[60] See the judgment of Cardozo J. in Beaty v. Guggenheim Exploration Co. (1919) 225 N.Y. 380 at p. 386 where he said: "When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." See Pound in 33 Harvard Law Review (1920), p. 420. *Cf.* Atkin L.J. in Banque Belge v. Hambrouck [1921] 1 K.B. 321, at p. 335. See Winfield in 53 Law Quarterly Review (1937) 448.

[61] Winfield in 54 Law Quarterly Review (1938) 530.

ARTHUR LENHOFF

The Problem of Compulsory Unionism in Europe

Introduction: The American Approach

One of the most controversial problems facing the present social law of countries in the stage of democracy and industrialism is that of legislative treatment of collective bargaining agreements by which an employee's right to work is made to depend on membership in a labor organization.[1] Concerning the position taken on the problem in the United States, it has properly been stated that legislative treatment of it has reflected its extremely troublesome nature, for "such an agreement is a patent interference with the employee's freedom of self-organization and an act of discrimination."[2] In this country, an approach to the problem first meets the question whether legislative approval of such an agreement makes, for the sake of labor organizations, too great demands on the individual employee which work to his disadvantage.[3] Conflicting arguments have been advanced: on the one hand, that of a need for security provisions in order to preserve bargaining power; on the other hand, it has been pointed out that an employer would never yield to a union's demand for a union shop clause if the union were not powerful enough to enforce its demand.[4]

Turning to the positive law, we see that the solution of the Labor-Management Relations Act presents a compromise between the moral idea of freedom in which unionism originated, and mechanical devices of compulsion, viz., compulsion brought on the individual to join a union and compulsion brought on the union to accept him as a member.[5] It is

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[1] Senate Committee on Labor and Public Welfare, Report No. 105, on S. 1126, 80th Cong., 1st Sess. 5 (1947).

[2] Russel A. Smith, Labor Law (2d. ed., 1953) 449.

[3] See concurring opinion of Mr. Justice Frankfurter in *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525 (1949).

[4] "A union is, therefore, strong before it obtains a security clause in the contract .... We thus find ourselves in the following paradoxical situation .... The weak unions lack the bargaining power to obtain it; and the strong unions who can obtain it, do not really need it...." Shister, Economics of the Labor Market (1949) 206.

[5] Labor Management Relations Act, 1947, §8(a) (3), as amended by P. L. No. 189, 1951; 29 U.S.C. §158 (a) (3). In the first place, the provision declares it to be unlawful to make union membership a condition of employment. (Prohibition of closed shop in the strict sense).

an unfair labor practice for an employer to discharge an employee for lack of union membership, and for a union to cause such a discharge, if there is reason to believe that such status is attributable to discrimination or reasons other than nonpayment of dues. In theory at least, each employee has a right to be represented by a union of his own choosing, or not to be represented at all, but it takes a certain brand of heroism for an employee to invite all the troubles involved in his exercise of this freedom.[6] How can he really offer any opposition to the union which is party to the union shop agreement which forced him in the first place into membership in a union with an internal policy with which he heartily disagrees? His freedom of choice is in practical conflict with such an agreement.[7]

Not even the National Labor Relations Act of 1935 attempted "to make closed shop agreements"—the word closed shop here used in the wider sense embracing all kinds of clauses conditioning employment on union membership—"legal in any State where they might be illegal. The bill does not interfere with the *status quo* of this debatable subject but leaves the way open to such agreements as might now legally be consummated."[8] The Labor-Management Relations Act of 1947 has expressly outlawed closed shops (in the strict sense) and has left it to the states either to prohibit union shop agreements entirely[9] or to regulate them.[10]

The employers may enter with the majority union, and since the 1951 amendment (Act of October 22, 1951, P. L. No 189, 82d Cong., 1st Sess.) even without a preceding referendum held among the employees (as the original Taft-Hartley Act had required), into any other "union security" agreement such as a union shop. Such an agreement gives him freedom to hire new employees or to continue his employees in his employment without regard for their membership or non-membership in the union provided that the employees join the union within 30 days after becoming employed or after the effective date of the agreement whichever is the later. In the second place, the employer as well as the union would commit an act of unfair labor practice, according to the provision, if at request of the latter the former discharged an employee whose membership, as the employer has reason to believe, was denied or terminated for reasons other than his refusal to pay initiation fees and the periodic dues. The same holds true where the admission of an employee to membership had been made dependent only on discriminatory terms. *Cf. id.* §8(a)(3) and §8(b)(2). These qualifications placed on the freedom to enter into such an agreement were absent in the Wagner Act. However, as will be seen *infra*, also the latter gave the States a free hand to forbid any kind of compulsory unionism. However, where the law of a state did not include such a prohibition, even a closed shop agreement in the narrow sense was given effect by the Wagner Act.

[6] Even an employee who had resigned from compulsory membership immediately upon the termination of collective contract had to go through the ordeal of Board and court proceedings to obtain her reinstatement, after her discharge insisted on by a union after a new contract had been signed. *Communications Workers* v. *NLRB*, 215 F. 2d. 835 (2d Cir. 1954).

[7] For a recent case, see *NLRB* v. *Biscuit and Cracker Workers*, 222 F. 2d. 573 (2d Cir. 1955). See also, *Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954).

[8] Senate Report, S. 753, 74th Cong., 1st Sess. 11 (1935).

[9] Labor Management Relations Act, 1947, §14 (b).

[10] *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, 314 (1949).

This is in accord with the allocation of the private-law employer-employee relationship and of questions concerning capacity, intrinsic validity, and interpretation of collective contracts to the states, a structural allocation embedded in our federal Constitution, and quite recently affirmed by the Supreme Court.[11] At this writing, eighteen states prohibit employers and unions from imposing union membership as a condition of employment.[12]

To round out the domestic picture, mention must be made of the 1951 Amendment to the Railway Labor Act of 1926. During a quarter of a century, the inclusion in a collective bargaining contract between a carrier and a labor union of a union shop clause was forbidden, expressly so by the 1934 Amendments. However, in the 1951 Amendment Congress did more than simply declare (as it did with all other labor relations affecting commerce) that nothing in the federal Act should render execution of a union shop agreement unfair or unlawful.[13] This still would have left 18 States with prohibitory laws concerning union shops. Congress, in order to make these laws ineffective, exempted those unions to which the Amendment applied from the conflicting State laws.[14] The highest court in

[11] *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 456 (1955).

[12] *Alabama*, Act No. 430, House Bill No. 222, Approved August 28, 1953; *Arizona*, Constitutional Amendment, 1946, 1947 Session, Laws of Arizona 399; 56 Ariz. Code Anno., 1939 (1952 Comm. Supp.) §§1301–1308; *Arkansas*, Ark. Stats. (1947) 81.201–205; *Florida*, Amendment to Sec. XII, Constitution of the State of Florida, Approved Nov. 7, 1944; *Georgia*, Act No. 140, L. 1947, Approved March 27, 1947; *Louisiana*, Act No. 252, Acts 1954, 2 July, 1954; *Nebraska*, Neb. Const., Art. XV, §§13, 14, and 15; *Nevada*, Act approved by voters Nov. 4, 1952; *North Carolina*, Gen. Stats. (1943), Ch. 95, §§78–84; C. 328, Sess. Laws, 1947, Approved March 18, 1947; *North Dakota*, H. B. 151, L. 1947, Approved March 13, 1947; *South Carolina*, Act of March 19, 1954; *South Dakota*, So. Dak. Code (1939), §17.1101; Amend. to Const., So. Dak., Art. VI, §2, adopted 1946 General Election; *Tennessee*, C. 36, L. 1947, Approved Feb. 21, 1947; *Texas*, Art. 5207a, Rev. Civ. Stat., Tex.; and *Virginia*, 40 Va. Code, §§68 *et seq.* In *Iowa* and *Mississippi*, entering into a union shop contract is a penal offense, but there are express exceptions directed to employers and employees subject to the Railway Labor Act. Code of Iowa (1950), §§736 A.1 *et seq.*; Mississippi, S. 1394, Approved Feb. 24, 1954; *Utah*, H. B. 85, became law on May 10, 1955.

Colorado, Kansas, Wisconsin, and the Territory of Hawaii require certain voting procedures as a condition precedent to the execution of a valid union shop agreement.

[13] 45 U.S.C. §152, Paragraph 11, 64 Stat. 1238 (1951). There is, however, a 60 day period (not 30 days as in the Labor-Management Relations Act) provided for an individual employee's joining the union; the amendment excepts from the necessity of joining the particular signatory union those operating employees who belong to another operating union which is "national in scope." See paragraph (c) of §152, Eleventh. The difficulties for determining whether a labor organization is "national in scope" are enormous. See *Pigott* v. *Detroit, Toledo & Ironton R. Co.*, 221 F. 2d. 736 (6th Cir., 1955).

[14] The amendment provides that carriers and labor organizations shall be permitted to make and enforce prescribed union shop agreements "Notwithstanding any other provisions of this chapter or of any other statute or law of the United States, or Territory thereof, or *of any State* . . ." (Italics added).

one of the States thus affected has very recently expressed its doubts about a reasonable relationship between interstate commerce, the protection of which is a lawful objective for Congressional action, and compelling union membership as a necessary, or even a merely proper, means to that end.[15]

A mild judgment on the present status of the American law regarding union shop agreements would have to call it confused and entangled. The reasons are manifest. With respect to conflicting positions taken by significant groups in social and economic matters, government in industrial democracies might either follow a hands-off policy, leaving the whole problem to the free play of strength at the disposal of each group, or it might assert its right to set the terms. And government might also change its stand. *Historia docet*, which means, experience will point to the socially desirable measures. However, our own experience is not the only source available to us. This idea found a superb expression in the remark of a prominent Italian student of comparative law: "As history reflects the experience we underwent in the course of time, so comparative law offers the means to enlarge our legal experience by extending it in terms of space. . . . This enrichment of our experience by means of the comparative law furnishes us with an indispensable aid to obtain the benefit of the experience of other nations."[16]

The following survey of the law of the free European democracies[17] con-

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[15] *Hanson* v. *Union Pacific R. Co.*, 160 Neb. 669, 71 N.W. 2d 526 (1955); but see *Hudson* v. *Atlantic Coastline RR.*, 89 SE 2d. 441 (1955) in which, however, only another feature of the Act of 1951 was at issue, namely that of granting operating employees freedom to refrain from joining the certified union if they were members of another organization. As for non-operating employees the Act contains no such freedom. The State Supreme Court held that the classification was reasonable.

[16] Tullio Ascarelli, Saggi Giuridici (Milano, 1949) 5.

[17] Since under totalitarian regimes labor organizations, whether or not called "unions," are government agencies rather than private organizations, there are no references herein to the law of Soviet Russia, Spain, or the satellite countries.

There is no discussion of the law of Italy for the reason that it presents a unique situation which casts no light on the problem under review. Under the Fascists, there were no free labor unions. Article 39 of the Italian Constitution of 1947 deals with unions and collective bargaining and presupposes an agency to bargain on labor's behalf, but it has not been implemented as yet by enabling legislation. There has been a draft of a statute to that end—the so-called Draft Rubinacci of 1951—but it has not become law. It provides for a commission composed of labor union representatives to serve as a collective bargaining agency, but execution of collective contracts is to be exclusively controlled by the Minister of Labor and authorities subordinate to him. A collective contract under such an arrangement would be tantamount to a statute or an ordinance. See Molitor, "The Draft of an Italian Statute on Unions." 5 Recht der Arbeit, (1952), 374.

The law in England is also passed over, except for a brief reference in the *Conclusion*, since the objective of this study is the law of non-common law jurisdictions.

fronted with the same problem as are we, viz., of adjusting the principles of individual freedom to the demands of a highly industrialized society, offers by itself the opportunity of a comparative examination of our approaches to the problem of compulsory unionism.

EUROPEAN LAW

I. Historical Background

On the Continent, the freedom of the individual to abstain from joining a transitory or permanent combination—the latter includes labor organizations or trade unions— developed *pari passu* with the evolution of the freedom to join. Under the influence of the French Revolution and the Napoleonic legislation, the guild system disappeared and with it the last remnants of the "journeyman fraternities" (*Gesellenbünde*).[18]

A study by the International Labour Office sets out a brief but familiar account of the inception of unionism on the Continent:

> "The early years of the nineteenth century saw the beginnings of large-scale industry. Its attraction for the mass of unskilled workers was such that the employers, with plentiful labour at their disposal, found themselves in a position such that they were able to lay down their own conditions of work. In order to obtain an improvement in these conditions the working people who, in spite of their numbers, had no organization and cohesion, were forced to make their own arrangements for defending themselves against the employer, who, as Adam Smith has pointed out, is a union in himself. The method they adopted was that of organization."[19]

As unions came into being, they also came into conflict with the State, for like the monarchies of the *ancien régime*, the governments in power during the period following the Napoleonic wars denied all freedom of association. A collective stoppage of work was considered a menace to law and order. This attitude was reflected very clearly in the French Penal Code of 1810 which imposed criminal penalties for labor union activities[20] and which had a great influence in other countries on the Continent. But it is a matter of general knowledge that these criminal sanctions did not stop the workers from resorting to concerted actions and, finally, starting about the middle of the nineteenth century, the idea gained ground everywhere in Europe that the liberal State which

[18] See I International Labour Office, Studies and Reports, Series A (Industrial Relations), No. 28 (Geneva, 1927), 9.

[19] *Ibid.*

[20] French Penal Code of 1810, Articles 414, 415.

abstained from intervening in economic matters concerning land and capital had to concede to the third great economic factor, labor, the freedom to combine.

The French Act of May 25, 1864, removed the stigma of criminality from peaceful concerted activity of workers. Thereafter, only a resort to threats or violence, fraud, or conspiracies intended to cause or further a work stoppage constituted a new crime which can best be translated as an "attack on freedom to work." Other countries followed suit, including Belgium in 1866, Germany,[21] Austria,[22] and the Netherlands.[23] Switzerland, in its Constitution of 1848,[24] had already recognized and extended protection to freedom of association.

Section 153 of the German Industrial Code of 1869 made it a criminal offense to force a person to join or remain a member of a union. Similar provisions were contained in the French Law just mentioned, and also in in §2 of the Austrian Act of 1870.[25] It appears then that these early statutes dealing with freedom of association sought to establish and assure—to use the generally accepted Continental terminology—an affirmative as well as a negative side of that freedom.[26]

The affirmative side of freedom of association is, of course, the liberty of a person to form or join an organization. Conversely, the negative side is his right not to associate, that is, to refrain from forming or joining an organization. In the aforementioned I.L.O. Study, the reason for the law's protection of both sides of this freedom is stated as follows:

"The law may consider that the individual rather than the organization must be protected . . . This occurred nearly everywhere after the repeal of the Acts forbidding combinations, for the State continued to mistrust organizations which, by their nature, threatened the existing order, and generally justified its attitude by urging the necessity of protecting the individual and preventing restraint of trade. The State may protect the worker who desires to work as against other workers who are on strike, and the worker who does not wish to take part in a combination from attempts to make him take part."[27]

For these reasons, the principle of voluntarism has permeated the

[21] Industrial Code of May 29, 1869.

[22] Act on Freedom to Combine of April 7, 1870.

[23] Act of April 12, 1872.

[24] Swiss Constitution of 1848, Article 46. This same provision is now contained in Article 56 of the current Swiss Constitution of 1874.

[25] Note 22, *supra*.

[26] 2 Huber, Economic-Administrative Law (1954—in German), 357.

[27] I.L.O. Study, *Op. cit.* note 18 *supra*, at 14.

development of labor unions on the Continent, and compulsory unionism has been entirely inconsistent with public opinion there.[28]

Article 20 of the Belgian Constitution of 1831 expressly established freedom of association and stated that it was not to be encroached upon. After this Article had been held to extend to the *liberté syndicale* [freedom to form and join a labor union], there was no doubt that the right to join included a right to refuse to join. This was specifically recognized in subsequent legislation, the Act of May 24, 1921. In the Official Statement of the Reasons for the Bill [*Exposé des Motifs*][29] which became the Act of May 24, 1921, it is provided that:

"A union which represents the majority of the employees in a business enterprise or in a certain area abuses its rights when it brings about behind the screen of a collective contract, the discharge from employment of workers who are not union members or who belong to another union. Its act is no longer the exercise of the freedom of association and of contract, but the negation thereof."[30]

An article entitled "*Freedom and Compulsion in the Present Law Concerning the Right to Combine*," was recently published by Födisch in the leading German legal periodical dedicated to labor law, the "Recht der Arbeit."[31] The author there states as a fact that the refusal of employees to join a union must not always be attributed to a desire to spare expenses, such as periodic dues, for their refusal may be motivated by many other considerations. One's interests may differ greatly from those of the union, as in the case of chemists, clinical engineers, actors, and musicians. Some individuals may want to stay out of the organization in order to take what advantage they may be able to gain by bargaining for themselves. There may also be fundamental differences in matters of principle, such

[28] The I.L.O. Study explains why the right to refrain from joining an association has been so readily accepted:

"When the principle of trade unionism was first enunciated, the legislating authorities endeavoured to ensure all possible guarantees for individual liberty, and freedom to refrain from joining an association was at that time considered as implicit in the doctrine of freedom of association. Even at the present time the right to refrain from joining an association is specially and explicitly guaranteed in many countries. . . .

"In [European] countries in which the right of association is specially protected, such protection generally covers also a right to remain outside of an association."

Id. at 30.

[29] On the Continent, it is customarily the Government which introduces bills before the legislative bodies and usually sends with it an *Exposé des Motifs*, herein translated "Statement of the Reasons," serving the very function its title indicates.

[30] See VII Répertoire Pratique du Droit Belge, Liberté d'Association et de Réunion, 567, No. 15.

[31] Födisch, "Freiheit und Zwang im geltenden Koalitionsrecht," 8 Recht der Arbeit (1955) 88.

as the rejection of any resort to collective action or the usual weapons of economic warfare. Födisch concludes his discussion by saying: "Surely, at present the large number of nonmembers strongly argues against any conclusion that it is reprehensible motives which cause an individual to be indifferent or averse towards existing organization."

Professor Arthur Nikisch states in his recent work on labor law that "In some old [German] collective contracts, clauses could be found providing for employment of union workers only, but they originated in an era when the unions had to fight hard for their recognition. However, by the 1920's such clauses had fallen more and more into disuse."[32] And he continues: "A statement to the effect that labor unions are deprived of the chance to expand their activities by prohibitions against com pulsory unionism, goes decidedly too far. No, the [German] trade unions have not deserved such a poor testimonial."[33]

In other words, even in Germany, the most industrialized of the European countries and one in which (aside from the Nazi era) the unions have played an important role for many years, there has been almost no resort to compulsory unionism.[34] And in France, where the unions have played a secondary role, they have resorted to compulsion even less for their growth and expansion.[35]

The fact is that the European unions have played upon the advantages they offer by way of bargaining power which make it *per se* desirable for the individual worker to join.[36] And Braun speaks of the strong feeling of independence from the employer characteristic of European unions.[37] They do not want an employer's assistance, even if only in the form of consent to inclusion of a union shop clause in a collective contract. They believe that if compulsory unionism were established as the norm they would be in danger of being drawn into a position where they no longer command the voluntary allegiance of their members. A collateral result of this attitude has been that the European unions rarely demand a check-off agreement.

The European attitude raises other questions which need consideration: In the first place, one might ask whether the power of the Executive to

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[32] Nikisch, Labor Law (1951—in German) 269.

[33] *Id.* at 270. Although the Nikisch view is the dominant one, there is opposition which is led by Professor Nipperdey. See note 63 *infra*.

[34] Jean Vincent, "The Termination of the Employment Relationship: A Comparative Study of German and French Law" (1935—in French), 490. [Bibliothèque de l'Institut de Droit Comparé de Lyon, Série Centrale, vol. 36].

[35] *Id.* at 490.

[36] K. Braun, The Right to Organize and Its Limits (1950) 149.

[37] *Id.* at 150.

extend the coverage of collective contracts beyond the parties thereto or its members, suggests one of the reasons why, in general, compulsory unionism has been rejected by the law in free Europe. In Austria, Belgium, France, Germany, the Netherlands, and Switzerland such an extensibility feature is embodied in specific legislative provisions.[38] However, the fact remains that in the United States a collective contract to which a labor organization representing a majority of employees within the pertinent group ("appropriate unit") is a party, subjects *ipso facto* all employment relationships to its contents regardless how few or how many employees, if any at all,[39] are members of that organization; not even an extension to nonmembers is required to produce this effect. And yet, compulsory unionism is in this country a consummation devoutly wished by many unions.

This brings us to the other question whether the rivalry among unions, where it is, as in a few European countries, based on differences in political or religious views, might explain the contrast in the legal approach to the same problem (of compulsory unionism) there with that shown here. Is there more merit in this hypothesis than in the former? It is submitted that an affirmative answer would have no more support in comparative facts than in case of the former. All along, the Scandinavian unions have shown no split *inter se*, either with regard to differences in political views or as to religious beliefs;[40] nevertheless, as will be seen later, there has been no great yearning for a union shop clause. In Austria or Switzerland, rival unions having a distinct political or religious flavor play a very insignificant role, as compared with the free unions, but no union shop

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[38] For the legislation in point see, as for all the countries mentioned in the text *supra*, except the Netherlands and Belgium, this writer's discussion in Labor Relations and the Law (ed. in charge Robert E. Mathews, 1953) 281–285. *Belgium:* From a practical view, the royal decree issued upon an agreement reached between on the one hand, the labor members, and on the other, the management members of a "Commission paritaire" (established by the Act of June 9, 1945, as supplemented by the Acts of March 4 and 11 of 1954) gives the terms of the collective contract the character of imperative legal norms for any employer-employee relationship within the branch concerned. Extension of collective contracts in the *Netherlands* has been initiated by the Act of March 25, 1937, by which the competent Minister has been authorized to extend the wage schedules and other terms of a collective contract branchwise and spacewise to nonmembers, on his own motion or upon application of the parties to the contract.

[39] *Cf.* for example, *Continental Oil Co. v. N.L.R.B.*, 113 F. 2d 473 (Cir. 10, 1940); *Matter of Pueblo Gas & Fuel Co.*, 23 NLRB, No. 111 (1940).

[40] *Cf.* Report of the Commission on Industrial Relations in Sweden, p. 2: "There are only five very small unions which are not affiliated with the National Confederation of Swedish Trade-unions." Neither specific political nor religious views separate the former from the latter, as one can see from *op. cit.* p. 11 note 2. For the Confederation, see *infra* Section III Subsection 3.

clause has ever met with success in the courts.[41] In the light of these facts, the view that union rivalry based on political or religious differences accounts for the anticompulsory unionism atmosphere in Europe, would be merely conjectural.

II. Laws Dealing Expressly with the Problem

1. *Belgium:* The Belgian Act of May 24, 1921, mentioned previously, added criminal sanctions to the guarantee of freedom of association which had been established in Article 20 of the Constitution of February 7, 1831. Article 2, clause 2, of the 1921 Act, defines that freedom as having not only an affirmative side but also a negative side. It reads: "Nobody can be compelled to join an organization or not to join it."

This is still more sharply defined in the following provisions. Article 2 of the same Act also emphasizes, *inter alia*, that any member of an organization "has the right to withdraw therefrom at any time. . . . Any provision in the constitution or by-laws of the association which may encroach upon or impair this freedom shall be regarded as if such a provision did not exist." Article 3 contains a prohibition, accompanied by penal sanctions, against coercion or violence against a person to induce him to become or refrain from being a member. This same article places side by side with coercion or violence any act against a person which might cause him to fear that he would lose his job or that he or some member of his family would suffer personal injury or damage to their property. Finally, Article 4, as indicated previously, prohibits making membership or nonmembership in an organization a condition of employment.[42]

[41] Statistics (1928) show that in Austria as against 772,762 workers organized in free unions, only 78,906 were organized in organizations religiously orientated; in Switzerland the proportion was 165,692:24,300. See the diagram annexed to article "Trade Unions" (Gewerkschaften) in 7, Der Grosse Brockhaus, 318 (1930) (in German). For court decisions in these countries see *infra* Section II, Subsection 3 and Section III, Subsection 5, respectively.

[42] The "Statement of the Reasons" which accompanied the Bill which later became the Act of 1921 said:

"The bill submitted to you proceeds on the principle of the *liberté syndicale* [freedom to organize]. An employee is granted that freedom, i.e., he may form or join an organization [*de se syndiquer*]. He also is granted the right to refuse to join an organization. He is free to participate in an organization of his own choosing. Bearing in mind the importance of the employment relationship and the injustice in permitting one class of citizens to keep another at its mercy with regard to that relationship, on which the life of an individual and that of his family depends, one realizes the good reasons which argue for intervention [by the State], because considerations of general interest call for measures to be taken in order to repress [the abuse of the power of an organization in exercising it]. There is an abuse, where an organization, in order to secure the monopoly of labor, goes beyond the area of freedom of contract and resorts to force, or if it otherwise prevents non-members from joining another organization, even one hostile to it. . . . An exclusion of non-union workers [from employment] cannot be put on the same footing as a commercial agreement between two businessmen to the effect that the

The Belgian courts have strictly adhered to the text and meaning of the Act of 1921. The decision of the Cour de Cassation, Belgium's highest Court, in *Verniers et Beckmans* v. *Vien*,[43] supplies an excellent illustration. One Vien, an employee in a photographer's shop, had withdrawn from the union. He refused to revoke his withdrawal, so, at the insistence of the union, the employer discharged him. Vien was successful in an action against the union officials. The Court ruled that conditioning employment upon union membership was a violation of the employee's freedom of association: "To make membership a condition of employment—a condition prohibited by law—is not to protect a legitimate professional interest but is something which is void of any legal or factual justification."

One of the leading works on the civil law of Belgium, referring to the Act of 1921 and the decision just noted, states that: "The laws which preserve or protect the principles of the liberty or equality of the citizens, are among those governed by the strongest public policy [*ordre public*] because they affect the essential interests of the State and constitute the basis for the economic or moral order under which a given society lives."[44]

2. *The Netherlands:* The Act on Collective Bargaining Contracts[45] deals with the problem of union shop clauses in a provision which requires no elaboration:

"An agreement whereby an employer becomes bound to employ only members of a certain church [religion] or persons entertaining a certain political view, or members of a certain organization, is null and void."[46]

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supplying with a certain merchandise by one to the other is to be regarded by the other as his exclusive source of such a merchandise. The essential difference between the two lies in the fact that a labor organization is more than a simple economic matter. . . .

"The motives underlying one's joining or leaving a union . . . may touch on the freedom of conscience . . . so that there must be limits on the means to be used [for causing a person to join a union]. Propaganda as a means of persuasion must be deemed lawful since it is only an exercise of the freedom of expressing an opinion. Where it draws upon the economic advantages derived by the individual from an organization, the facts may bear it out. And such propaganda does not involve an attack upon the liberty of a worker who is requested to join the union.

"However, anything which leaves a person no choice other than to accept a threatened injury or join an organization, that is, a membership forced upon him, must be proscribed."

12 Pasinomie, 5th Series, No. 275 (1921). "Pasinomie" is the official title of the complete corpus of statutes and ordinances. The collection contains also the legislative history of an act and its *Motifs* (see note 29 *supra*).

[43] Pasicrisie 1923, I, 329. This is the "*Pasicrisie Belge*," a general reporter containing the decisions of the Cour de Cassation, of the Courts of Appeal, and of the Courts of first instance.

[44] 1 Henri de Page, Traité Élémentaire de Droit Civil Belge (2d ed., 1948—French), 103.

[45] Act of December 24, 1927 (S.415).

[46] Act of December 24, 1927 (S.415), Art. I, para. 3. The particular clause has not yet

3. *Austria:* In 1927, the Supreme Court of Austria decided a case involving an employer's action seeking a declaratory judgment that he was not bound to comply with a union demand that he terminate the employment of a certain individual who had withdrawn from the union. It held for the employer, ruling that a provision of a collective bargaining contract with the union conditioning employment on union membership was null and void.[47] The same result was reached in a subsequent decision.[48]

Any doubts about the invalidity of a compulsory unionism provision in Austria were put at rest by its legislature in 1930:

"Provisions in collective bargaining contracts between employers and employees are null and void if they are intended (1) to ensure that no persons other than members of a particular union are employed in the shop, or (2) to keep from employment in the shop persons who are members of a particular union."[49]

This Act is still in effect,[50] so that a union shop agreement unquestionably is null and void in Austria today.

4. *Denmark:* A statute enacted in 1929 directs that any action or conduct which in an unjustified manner seeks to restrict the freedom of an individual to engage in an occupation, or his right to join any organization or to abstain from joining any, shall be deemed unlawful.[51] Both civil and criminal penalties are provided. This same Act states that any collective agreement which restricts an individual's free access to work shall be denied legal effect by the courts.

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faced a judicial test. Undoubtedly, union shop clauses are enforced in some trades in some areas of the Netherlands just as no right-to-work law has been completely effective in the United States. Actually, it seems that the union shop is prevalent in the printing industry. But it can be presumed that the courts would not give their blessing to it if and when presented with the problem. At present prewar legislation plays a very insignificant role, because wages and other conditions of work are subject to regulation by the *College van Rijksbemiddelaars*, the members of which are appointed by the Minister of Labor. Any collective contract calls for the approval by the *College*. (Act of October 5, 1945, I.L.S. 1945—Neth.1.)

[47] Decision of March 8, 1927, 45 Zentralblatt für die Juristische Praxis 602 (1927).

[48] Decision of the Supreme Court of June 23, 1926, (1926) Rechts prechung 206.

[49] Section 1, Act for Protection of the Right to Work and the Right of Assembly, April 5, 1930, BGBl 1930, No. 113, 546.

[50] See the Act of July 6, 1954, BGBl. No. 196, containing an amendment to the Act of 1930 cited in note 49, *supra*, by allowing checkoff agreements between the individual employee and the employer.

[51] Act of March 27, 1929, for the Protection of Occupational Freedom, No. 70, International Labor Office Legislative Series 1929, Denmark: 2; 56 Annuaire de Législation Étrangère, 2d series (Paris, 1929), 184.

III. The Status of Compulsory Unionism in Those European Countries Which Do Not Have Specific Statutory Provisions Dealing with the Problem

1. *Germany:* As mentioned previously, freedom of association, as elsewhere in the West European countries, was established in Germany in the second half of the 19th century.[52] The Code of 1869 established freedom to join a labor union, and included a provision which penalized any resort to violence or threats to make a person join, or to prevent him from leaving, an organization of workers.[53] Consequently, only voluntary labor organizations were granted immunity from criminal prosecution (*Koalitionsfreiheit*). Freedom from prosecution was, of course, not identical with legal protection from discriminatory steps such as discharge of a worker because of his exercise of his freedom of association. In November, 1918, immediately after the collapse of the Hohenzollern-Reich, that provision was repealed.[54] However, Article 159 of the Weimar Constitution guaranteed to workers a right to organize (*Koalitionsrecht*), that is, protection from any employer discrimination because of union activities.[55] It also outlawed yellow-dog contracts.

Its historical background explains why the Weimar Constitution specified only the positive aspect of freedom of association. In his study "Is Compulsory Unionism Compatible with the [Bonn] Constitution?,"[56] the late Professor von Mangoldt, speaking of the Weimar era, stated that: "The history of freedom of association shows that dispute about it has always turned upon its affirmative side, and concerned itself very little with the negative aspect. This is explained by the fact that questions about the negative could arise only after the affirmative had been effectively established."[57]

As stated previously, the Code of 1869 protected the individual from being forced to join or remain a member of a union. In November, 1918, there was no doubt about this freedom not to join, so that the interest of

[52] Industrial Code of May 29, 1869.

[53] *Id.*, §153.

[54] Declaration of the Council of the People's Mandatories of November 12, 1918.

[55] This Constitution became law on August 11, 1919. The provision referred to reads: "The freedom to combine for the purpose of protecting and promoting working and economic conditions is guaranteed to anybody and for all occupations. Any agreement or measure which seeks to restrict or hinder this freedom is unlawful." See the decision of the German Supreme Labor Court, 6 Bensh. Slg. No. 27 (1929).

[56] 6 Der Betriebs-Berater (1951), 621.

[57] American legislative history affirms this sociological-political phenomenon: after the guaranty of the right to combine had been well established as the result of the Wagner Act of 1935, 49 Stat, 449 (1935), 29 U.S.C. §§151–166 (1940); the question of the negative side arose and found its legislative answer in 1947, in the amendment of §7, included in the Labor-Management Relations Act of 1947, 61 Stat. 136 (1947), 29 U.S.C. §§141–197 (1952).

the unions at that time was on the positive side of the freedom of association—it was focused on protection of the right of the worker to be free from discrimination in case of his forming or joining a union. The objective of the unions was, as Professor Arthur Nikisch has said, removal of all obstacles in the path of the individual's forming or joining a labor union.[58] When these had been removed by the Constitution of 1919, the unions' power was bound to grow. But power, as the maxim goes, invites abuses, and later, when abuses had occurred, questions arose about protection of the negative side of freedom of association.

Following the Weimar Constitution, there was unanimous condemnation of the "specific-organization clause," that is, a clause conditioning employment or membership, existing or to be required within a period of 30 days or so, in the particular union which is the party to the contract. But even with respect to the "general-organization clause," requiring membership in a union but not necessarily that which signed the contract, the prevailing opinion emphasized that Article 159[59] guaranteed not only the affirmative but also the negative side of freedom of association.[60]

Germany's highest court, the Reichsgericht, in *Genossenschaft* v. *A.*,[61] declared that a union shop clause must be held null and void because it invades the individual's freedom of association, and because it cannot be reconciled with ethical principles ("good morals").

The highest German court dealing exclusively in matters of labor law, the Reichsarbeitsgericht, took a similar view of a discharge of an employee at the behest of a union and for the sole reason that he was not a union member. Such action, said the Court, offends the most fundamental concepts of justice of everybody whose thinking is just and fair.[62]

Under the new Constitution for Western Germany, the Basic Law of the Federal Republic of Germany, 1949, generally referred to as the *Basic Law of Bonn*, it is the opinion of almost all courts and many eminent legal scholars[63] that any kind of compulsory unionism is emphatically repudiated.[64]

[58] Nikisch, *op. cit. supra* note 32, at 268.

[59] Quoted in note 55, *supra*.

[60] See the leading text on the Weimar Constitution, Anschütz (13th ed., 1930), 630; also Kaskel, Labor Law (3d ed.), 279; 2 Huber, *op. cit. supra* note 26, at 360.

[61] 104 R.G.Z. 327 (1921).

[62] 4 RAG 19 (1929).

[63] But one of the outstanding German legal scholars, Professor Nipperdey, denies that any protection of the negative side of freedom of association can be read into Article 9 of the *Basic Law*. Nipperdey, "Labor in the Basic Law," 2 Recht der Arbeit 216 (1949—in German); see also Hueck and Nipperdey, Law of Collective Contracts (2d ed., 1952—in German), Sec. 2, No. 20.

[64] When the question of the negative side of freedom of association was raised at the Conference of the so-called Parliamentary Committee, which considered the proposals which

Even prior to formation of the new Federal Republic in 1949, the constitutions of several German states (*Länder*) included provisions to this effect.[65] The negative aspect of freedom of association in the area of ordinary union membership was so widely acknowledged and accepted that there can be no doubt that it was regarded as unnecessary to provide for it specifically.[66] Accordingly, confining itself to the affirmative, Article 9 of the *Basic Law* provides that:

"(1) All Germans shall have the right to form associations and societies.
"(2) Associations, the objects or activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding, shall be prohibited.
"(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to everyone and all professions. Agreements which seek to restrict or hinder this right shall be null and void. Measures directed toward this end shall be unlawful."

The consequences of the foregoing are clear. First, with respect to private parties, the constitutional freedom of association clearly precludes "any method of direct or indirect compulsory unionism [*Organisationszwang*]."[67] Coercive measures intended to force men into labor union membership are, therefore, null and void.[68] Utilization of a union shop

became the *Basic Law of Bonn*, the labor union representatives agreed with the other members of the Committee that the principle of voluntariness must be maintained as the basis of the right of association. Födisch, "Freedom and Compulsion in the Present Law Concerning the Right to Combine," 8 Recht der Arbeit (1955) 88, 89.

[65] For example, Constitution of Hesse (1946), Article 36; Constitution of Bremen (1947) Article 48.

[66] When the draft of Article 9 was deliberated in conference by the Principal Committee (Hauptausschuss), a question was raised about membership in professional organizations *publici juris*, such as the integrated Bar, engineers', and physicians' associations. On the Continent, associations of this character are public corporations and membership in them follows automatically upon admission to practice of any of the professions. When this question was raised before the Principal Committee, the fear was voiced that express recognition in Article 9 of the negative aspect of freedom of association might be seized upon as an excuse to practice in the professional fields without membership in the appropriate professional association. The possibility of drafting exceptions was considered, but no agreement on exceptions could be reached. So, although there was no doubt that the freedom of association applied to ordinary trade unions included a right not to join, there was no specific mention of the negative aspect in Article 9. For these legislative-historical facts, see Record of the Principal Committee, 210 *et seq.*, and 569 *et seq.*; decision of the Court of Appeals in Coblenz (*Oberlandesgericht*) of December 23, 1950, 4 Neue Juristische Wochenschrift 366 (1951); Bonn Kommentar [Commentary on the Basic Law of Bonn (a treatise compiled by several specialists on the Bonn Constitution, 1950)] 14; Födisch, *op. cit. supra*, note 31, at 89.

[67] 2 Huber, *op. cit. supra* note 26, at 386.

[68] Gernandt, "Infringements on the Negative Freedom of Association," Der Arbeitgeber (1954), 194; 2 Huber, *op. cit. supra* note 26, at 386.

clause is wrongful and renders one liable for damages.[69] A notice of termination of employment, if given because of the employee's refusal to join a union or to continue his membership, is likewise null and void.[70]

Secondly, the German constitutional prohibition against compulsory unionism is directed also against Government interference with freedom of association. With respect to the Government, it must be remembered that since freedom of association includes a freedom to abstain from joining a private organization, any legislative or administrative act which provides for direct or indirect coercion into membership, is invalid. This is generally recognized,[71] and is exemplified by the decision of the Court of Appeals in Coblenz (*Oberlandesgericht*),[72] which invalidated an ordinance directing fruit dealers to join the local organization of fruit dealers. The basis of the opinion is the Court's ruling that freedom of association must include a freedom to abstain from joining any organization. The only question then, said the Court, is "whether or not the legislature may enact exceptions to this principle." It held that the German Constitution does not provide for any exceptions. "The absence of any provision allowing for exceptions bars the legislature from making any, regardless of whether the exceptions would relate to the affirmative or to the negative side of the freedom of association."

One legal writer states—and on a good logical basis—that any attempted distinction between the two aspects of freedom of association is relative rather than absolute. He believes that a clause in a collective contract made between an employer's association *A* and a union *B* which makes it a condition of employment that every employee join the union *B*, is not only violative of the negative side of that freedom, but also of the affirmative side, for by conditioning employment on membership in *B*, an employee is prevented from joining the union *C* or *D*, and so on.[73]

However, this discussion of the impact of the Constitutional guaranty of freedom of association does not present the whole legal picture for Germany. The Chief Justice of the Labor Court of Appeals in Hannover, Hans-Dietrich Rewolle, called attention a few years ago, in an article in a periodical specializing in problems of labor law,[74] to other constitution-

[69] Nikisch, *op. cit. supra* note 32, at 270; Gernandt, *op. cit. supra*, note 68, at 196.

[70] 2 Huber, *op. cit. supra* note 26, at 386.

[71] Bonn Kommentar, *op. cit. supra* note 66, at 14; see 2 Huber, *op. cit. supra* note 26, at 386.

[72] Decision of December 23, 1950, 4 Neue Juristische Wochenschrift 366 (1951).

[73] Gernandt, *op. cit. supra* note 68, at 194.

[74] Rewolle, "Protection of the Negative Side of Freedom of Association: Compulsion to Join an Organization is Violative of Everybody's Right to the Free Development of his Personality," 3 Der Betrieb 594 (1950).

ally protected individual rights involved in this problem. He was not the first to do so, for among the considerations which have prompted many legal scholars[75] to deny constitutional validity to union shop clauses, is the notion that an individual may not be deprived of his natural freedom to use his faculties. The *Basic Law of Bonn*, like the Constitution of the United States which in many respects served as its model, proceeds upon the premise that there are certain fundamental inalienable human rights. It even expressly states:

Article I:

"(1) The dignity of man shall be inviolable. To respect and protect it, shall be the duty of all state authority.

"(2) The German people, therefore, acknowledge inviolable and inalienable human rights as the basis of every human community, of peace and of justice in the world.

"(3) The following basic rights shall be binding as directly valid law on legislation, administration, and judiciary.

Article II:

"(1) Everyone shall have the right to the free development of his personality. . . .

"(2) Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. . . ."[76]

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[75] It is important to remember that publications of Continental legal writers have enjoyed a considerable persuasive authority in the courts of the Continental countries. *Cf.* E. J. Cohn, 1 Manual of German Law (ed. by the British Foreign Office, 1950) No. 8, p. 3 and Moses, "International Legal Practice," 4 Fordham L. Rev. 244 ff (1935), quoted in Schlesinger, Comparative Law—Cases and Materials (1950), 25–26.

[76] Wernicke, in the Bonn Kommentar (Part II, p. 2 (1950)) in his analysis of Article II (1) of the *Basic Law, supra*, writes as follows:

"This Article is clearly intended to be in opposition to the organizational way of thinking and to a collective ideology [*kollektivistische Anschauung*] which seeks to force an individual to surrender his self-determination and to let himself, as only a member of the masses, be integrated in a collectivized whole not visible to him, or, indeed, to be nothing more than a robot. The personality develops by engaging in activities. Whereas the Weimar Constitution [Article 114(1)] included only a general proposition—in the same wording as Article 2(2) of the Basic Law [Bonn], which was subject to interpretative doubts about the inviolability of the freedom of the individual, the Basic Law is directed unequivocally to the general freedom of the individual to determine his actions in all fields of life."

Professor Nikisch' statements (*op. cit. supra* note 32, at 268) point in the same direction:

"The desire to enjoy personal freedom, particularly freedom from compulsory unionism, emerged much stronger from the experience of the Hitler era than it had been at the time of the creation of the Weimar Constitution. The new Constitutions [the Basic Law of Bonn and the constitutions of the Länder (States)] guarantee the individual the right to the free development of his personality along with the freedom to determine by himself whether he wants to join others in the pursuit of objectives common to them. . . . Thus, the individual is protected by the Constitution from coercion which might be brought to bear on him to force him into an organization. This is the view taken by the expounders of the Constitution; *Bonn Kommentar*, Annotation (to Article 9) II 1 (d) and 3 (e). *Von Mangoldt, op. cit.* (to Article 9), annotation 4."

The courts have followed the same line of reasoning.[77]

These views express what Dr. von Sivers sets forth in these words: "Even without an express legislative dictate, injury or damage inflicted upon an individual because of his nonmembership in a union is violative of fundamental constitutional rights, *viz.*, that of an individual freely to develop his personality (see Art. 2). . . ."[78]

"Surely," another writer says, "personal freedom is involved. A clause in a collective agreement which makes union membership a condition of employment, necessarily means that the individual is forced to join the union if he wants to keep his job. It is obvious, that, at the very least, obstacles are laid in the individual's path to making up his own mind as to whether or not to become a member."[79]

2. *France:* Like Germany, France has not enacted particular legislation concerning union shop clauses, and, also like Germany, it has relied on great constitutional tenets and on general principles of law to determine whether clauses of that kind are lawful.

Clause 5 of the Preamble to the present French Constitution of October 13, 1946, proclaims that:

> "Everyone has the right to obtain employment. No one may suffer in his work or his employment by reason of his antecedents, his opinions, or his beliefs."

No case is known which has construed this provision since its proclamation in the new Constitution. A prominent treatise on French labor law emphasizes that the freedom-to-work and freedom-of-occupation principle proclaimed by the Revolution of 1789 has never been impaired.[80] It was supplemented by the Act of March 21, 1884, Article 7 of which directs that "An employer or an employee is free to determine whether or not he wants to join an organization. Anybody who has joined an organization is at liberty to withdraw therefrom." Professor Pic expresses the prevailing view very clearly when he says that: "To place before a nonmember the alternative either of becoming a union member or losing his job, is to put him in an unbearable situation. Such action is both contrary to the principle of freedom to work, proclaimed by the Act of 1791 (2–17 March) and maintained by the Act of 1884, and contrary to

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[77] See decision of the State Labor Court at Munich, March 21, 1950 (reported by the Bavarian Ministry of Labor, Official Gazette, 1950, 249); Court of Appeals Coblenz, note 72, *supra*.

[78] von Sivers, 2 Mensch und Arbeit (1950), 9.

[79] Gernandt, *op. cit. supra* note 68, at 194; and in "The Negative Aspect of Freedom of Association," Der Arbeitgeber (1954), 154–156.

[80] Pic, Traité Élémentaire de Législation Industrielle (6th ed., 1930) No. 350, 230.

the guaranty of freedom of association contained in Article 7 of the Act of 1884."[81]

Similar lines of reasoning are contained in other leading works on French private law.[82] Discussing the freedom-to-work principle proclaimed by the Revolution, Planiol and Ripert question whether a covenant in which an employer gives up his full freedom to choose and retain his personnel is compatible with this freedom, and answer in the negative: "For the evaluation of those covenants it is important to bear in mind that union organizations are completely free under French law."[83] By a note, it is also stated that "The principle of freedom of unionism [*liberté syndicale*] has been affirmed in the Preamble to the Constitution. Clauses in a collective bargaining agreement cannot make unionism compulsory." Planiol and Ripert go on to explain why the facts underlying the decision of the Cour de Cassation in *Raquet* v. *Syndicat des travailleurs du bâtiment à Halluin*[84] show that it is not authority to the contrary.[85] The *Raquet* case involved a union shop clause in a collective contract between a construction firm and a union. The contract had been agreed upon after a strike and, among other things, it reinstated striking workers in their jobs. The clause was limited to construction work—a seasonal job—in a small community and was also limited in time. The Court denied the claim of three plaintiffs for damages. They had brought suit against the leaders of the union, based on the fact that they had been dismissed from their jobs because of their refusal to join the union.[86]

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[81] *Id.*, No. 351, at 232.

[82] For instance, 11 Planiol and Ripert, Traité Pratique de Droit Civil Français (2d ed., 1952), No. 804.

[83] *Id.* at 45.

[84] October 24, 1916. D.P. 1916 I.246.

[85] 11 Planiol and Ripert, *op. cit. supra* note 82 at 46, n.l.

[86] The Cour de Cassation declared:

"*A priori* that [union shop] clause violates the principle of freedom to work and the principle of free unionism under which an employee is at liberty to join or not to join a union. Securing these principles is the duty of the courts. However, there is also the principle of freedom of contract, to be protected if the *causa* of the contract is not contrary to the public order or to good morals. Most certainly the *causa* would be unlawful if the employers had unrestrictedly been precluded from freely selecting personnel outside of the ranks of workers in the union. However, matters are different in the case at hand. The clause is far from being general and absolute; it is restricted in terms of place and in terms of time. These limitations are generally recognized in theory and practice of law just as similar limitations have been recognized as making a restrictive covenant valid. It has been repeatedly stated that employers do not act wrongfully by making a covenant by which they are obligated to reinstate employees who have been on strike . . . no one would think that employers should be free to regard such agreement as null and void when they entered into it voluntarily in their business interests and in order to bring a strike to an end."

For the concept of *causa* in civil law systems, see Lorenzen, "Causa and Consideration in the Law of Contracts," 28 Yale L. J. 621 (1919).

It is clear from the opinion itself that it is not to be construed as a precedent for the validity of union shop clauses. This is not only the view of Planiol and Ripert, but also Pic's treatise[87] refers to the fact that the Court emphasized the importance of the individual motives of the contracting parties in each case, and the reciprocal interest of both parties in resolving their dispute.

Aside from this, the *Raquet* decision of 1916 is not the last word of the *Cour de Cassation*. In *Journal l'Oeuvre* v. *Doublet*,[88] it affirmed the judgment of the *Tribunal Civil de la Seine* granting damages for an unlawful discharge which was based on the plaintiff's withdrawal from the printers' union. The defendant, the newspaper *Oeuvre*, had agreed with the union to keep in its employ only those persons who were or would become and remain members of the union. The Court pointed out that "The plaintiff, an employee of long standing, had originally joined the union only under the pressure brought to bear upon him. As a person in a subordinate position, he could not resist such pressure. By entering into a union shop agreement, the defendant has shown that he has no interest in the fate of the employee whose discharge was caused by him; nor has he given any thought to the question of his reinstatement." Compliance with the union shop agreement was the newspaper's defense. "Such an agreement," said the Court, "cannot lawfully modify the employer-employee relationship and deprive employees, under the pretext of their being non-organized, of the right to sue the employer for damages for wrongful discharge. Such a discharge is wrong as an abuse of rights." The Court concluded: "In view of all this, the discharge of an old and deserving employee constituted an abuse of the employer's right to discharge, when the only reason for it was the fact that the plaintiff was not a member of the union."[89]

The highest French court, as is stated, thereby advanced as the basis for its decision the concept of "abusive exercise of a right" (*abus de droit*). This is a principle which all Romanic legal systems have adopted. One of the leading French treatises discusses it as follows: "Rights are not

[87] Pic, *op. cit. supra*, note 80, No. 351, p. 232, n. 2.

[88] March 9, 1938, R. H. 1938, 305, Gaz. Pal. 1938. I. 749.

[89] Ever since enactment of the law of July 19, 1928, Code du Travail, Book I, Title II, Art. 23 (2), French law provides that in a discharge from employment an employee is entitled to such notice as is usual in the locality and trade concerned. However, the French decisional law, based on the legal doctrine of abuse of rights has provided for an additional indemnity for which an employer, even though he has strictly complied with the period-of-notice statute, becomes indebted to the employee in case the termination of the employment was not founded upon a justifiable reason (*motif justifié*). *Cf.* Lenhoff, "Some Basic Features of American and European Labor Law: A Comparison," 26 Notre Dame Law. 389, 395 (1951).

absolute prerogatives and not created exclusively for the purpose of gratifying the holder of the right. They cannot be absolute. They are endowed only with a relative power."[90] Then, after reviewing older doctrines dealing with the principle of "abusive exercise of rights," the work refers to the doctrine which at present has mostly been accepted: "Law creates rights for certain social purposes aiming at the establishment of a social equilibrium. A right is, therefore, abusively exercised when the exercise thereof perverts the socially desirable purpose for which it was intended. . . ."[91] Professors Rouast and Durand take a similar approach to the problem of compulsory unionism in a work of theirs widely used and quoted by French courts.[92]

A union shop clause which seeks to force union membership on an employee is, therefore, regarded as tortious in France, because on the one hand, it interferes with personal freedom and freedom of association, and, on the other hand, because it constitutes an abusive exercise of rights.[93] "The right to terminate an employment relationship not entered into for a specified time and therefore terminable at will by either party, according to Article 1780 of the Civil Code, is subject to abuse."[94] And, the same authority continues, "An abusive exercise of rights lies in the discharge of an employee because of his nonmembership in a union."[95]

It is appropriate to add that years ago when employees were often discharged because of their affiliation with a union, courts frequently resorted to the theory of abusive exercise of rights in order to condemn such discharges for their interference with freedom of association.[96] And when the government intervened to protect those who lost or were denied employment because they were union members, it was obvious that the same rules would have to be applied to the converse situation, that is, when one is discharged because of nonmembership in a union. Even prior to the *l'Oeuvre* decision in 1938, lower courts had arrived at this result. The Tribunal Civil de la Seine, in *Comoedia* v. *Laquerrière*,[97] held in favor of an employee who had been discharged because he was not a union member.

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[90] 2 Colin and Capitant, Cours Élémentaire de Droit Civil Français (10th ed., by Julliot de la Morandière, 1948), No. 325.

[91] *Id.*, No. 325.

[92] "Précis de Législation Industrielle" (3d ed., 1948) No. 350.

[93] Henri Mazeaud et Léon Mazeaud, Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle (3d ed., 1938), 623.

[94] *Ibid*; see note 89 *supra*.

[95] *Id.* at 628. There is a footnote reference to the decision in the *l'Oeuvre* case, see note 88, *supra*.

[96] Pic, *op. cit. supra* note 80, No. 1197; Vincent, *op. cit. supra* note 34, at 487.

[97] February 1, 1934, D. H. 1935, Sommaires 3.

3. *Sweden:* Labor relations in Sweden have been marked by self-government by industry and labor with as little intervention by government as possible.[98] In 1899, the Confederation of Swedish Labor Unions (*LO*) was established and thereafter, in 1902, the employers reacted by forming their own Swedish Employers Federation,[99] (*SAF*),[100] which includes all the large and most of the small businesses in the country.[101] The result was that these two powerful federations entered into a basic agreement—periodically renewed ever since—providing for industry-wide agreements which rest on equality in bargaining power. Under this agreement, employers are said to retain not only "the usual employer privileges, but also some that American employers have lost."[102]

Almost from the beginning, the constitution of the Swedish Employers Federation has forbidden its members to include a clause in a collective contract conditioning employment on union membership. It expressly provides that: "Any collective agreement must include a clause to the effect that the employer shall have the right to hire and to discharge employees at his discretion, to direct and distribute the work, and to employ workers belonging to any union or workers belonging to no union."[103]

Because of this, Swedish unions have very rarely asked for clauses requiring union membership from members of the powerful Employers Federation.[104] And when smaller employers, not members of the Federation, have been forced to consent to make membership in *the* contracting labor organization a condition of employment, it has been invalidated by the Swedish Labor Court.[105]

By an amendment of May 17, 1940 to the Act on the Right of Association and of Bargaining, the concept of freedom of association in Sweden was strengthened.[106] The fact that a violation of that right is based on a

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[98] Book Review, 56 Harv. L. Rev. 1030 (1943).

[99] See James J. Robbins, The Government of Labor Relations in Sweden (1942); see also Folke Schmidt and Heinemann, 14 Chi. L. Rev. 184 (1947).

[100] *LO* is the colloquial abbreviation of Landsorganisationen, and *SAF* the abbreviation of Svenska Arbetsgivareföreningen.

[101] Braun, *op. cit. supra* note 36, at 208.

[102] 55 Harv. L. Rev. 555 (1942), a book review of Norgren's The Swedish Collective Bargaining System (1941).

[103] Robbins, *op. cit. supra* note 99, at 285.

[104] Braun, *op. cit. supra* note 36, at 163.

[105] *Cf.* A.D. dom. [Arbets domstolens domar—Reports of the Labor Court] 1939, No. 24; A.D. dom. 1937, No. 73.

[106] The Act on the Right of Association and of Bargaining became law on September 11, 1936.

contract obligation is no defense.[107] In 1948, the Labor Court rendered a decision involving a clause conditioning employment upon membership in the union which was a party to the collective contract. In compliance with this provision, the employer had discharged an employee who belonged to a union other than the signatory to the contract. The Court ruled that the discharge violated the employee's freedom of association.[108]

4. *Norway:* The law of Norway shows features analogous to that of Sweden. The attitude of organized Norwegian employers towards union shop clauses corresponds with that of their Swedish brothers,[109] and such clauses are not found in any significant collective contracts.[110] Like the Swedish unions, those in Norway have succeeded in organizing the great majority of employees without resort to compulsory unionism. In many industries, there just are no employees who are not union members.[111]

5. *Switzerland:* In Switzerland, the basis of the law of collective contracts is Article 322 of the Federal Code of the Law of Obligations. The general view is that it is unlawful to condition employment on union membership.[112]

In this vein, a decision of the Appeal Court of Zürich has declared that a clause conditioning employment on union membership is contrary to good morals and null and void.[113] Quite recently, in 1949, the Federal Court of Switzerland—the highest court—reached the same result.[114]

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[107] See Carl Kurtz (Malmö, Sweden), "Collective Contract Law of Sweden," 107 Zeitschrift für die gesamte Staats-Wissenschaft 510, 528 (1951—in German).

[108] A.D. dom. 1948, No. 21.

[109] Galenson, Labor In Norway (1949), 205–207.

[110] *Ibid.*

[111] Galenson, *op. cit. supra* note 109, at 207.

[112] Thus, a leading treatise states that:

"Unions today show tendencies which point to certain political and economic views. It is contrary to good morals to compel an employee to join a union by removing the bread basket from his reach, and making it more difficult to make a living. It is clearly inequitable to seek to obtain benefits for the union by imperiling, if not destroying, temporarily or permanently, the economic existence of an employee or his family. Such inequality is brought about by clauses requiring union membership. Whether or not he shall join a union is a question which must be freely determined by an employee. In this regard, not only the freedom to associate is at issue, but also the freedom to abstain from any association. Either side of freedom must be deemed protected from being interfered with by means of compulsion. . . ."

2 Oser-Schönenberger, The Law of Obligations (2d ed., 1936—in German), 1182 No. 34.

[113] December, 1930, Schweizer Juristenzeitung 339.

[114] 75 II 308 (1949). The most significant feature of this latter decision lies in its *ratio decidendi*. Said the Court:

"Individual freedom is not impaired by the principle that contract obligations should be complied with, a principle which controls a law of collective contracts. However, according to the opinion generally accepted at present, an agreement by which an employer is obligated to condition employment on membership in the particular union which is party to the collective contract is unlawful. Such an agreement would virtually compel an employee who is not

In another opinion of the Federal Court,[115] dealing with the question whether a nonunion worker can be required to pay dues as a contribution to the costs incurred by the collective bargaining agent, the same view was expressed:

"It must be made possible that concerning the question of membership in a union an individual is given full freedom of choice. Where those contributions were charged in an unreasonably high amount of money, which could virtually amount to forcing upon a nonmember membership, the charge would be tantamount to an impairment of personal freedom, a freedom to which any human being is entitled, and would therefore be unlawful."

All this explains why union shop clauses are virtually nonexistent in Switzerland.[116]

Conclusion

Thus, it seems that in the Western European countries there is no great love lost for agreements conditioning employment upon membership in a labor organization. Of no small significance is their recent experience with totalitarian regimes which, naturally enough, has had a profound effect on their approach. It is interesting to note the extent to which the notions of freedom of personality (*Persönlichkeitsrecht*) and other individual freedoms have influenced their approach to the problem. In the minds of these nations, freedom of personality embraces a good deal more than the right to be left alone.

In this connection it is also instructive to cast a glance at recent developments in the International Labor Organization (ILO). At the request of the Economic and Social Council of the United Nations, the International Labor Conference of the ILO resolved at its 30th session[117] to place on the agenda of the next session[118] the question of the freedom of association and of the right to organize. The ILO circulated among the member nations of the United Nations a summary report on the problem

a union member or who is a member of another union to become a member of the union which is a party to the collective contract, for otherwise he could not have the job. It unlawfully interferes with the negative freedom of association, i.e., the right to abstain from joining a union without economic injury. A union shop clause is, therefore, to be regarded as an unlawful restriction of the 'personal right' [*Persönlichkeitsrecht*] guaranteed in Article 28 of the Civil Code."

The Article referred to is Article 28(1) which provides that: "Where rights personal to an individual are unlawfully invaded, an action lies to stop that invasion."

[115] March 25, 1948, 74 II 158 (1948).

[116] *Cf.* Professor Dr. Walther Hug (University of Zürich), Problems of Organizational Labor Law (1953—in German), 12.

[117] Geneva, 1947.

[118] San Francisco, 1948.

along with a questionnaire requesting their replies. Among European countries, France, Belgium, the Netherlands, Sweden, Switzerland, Finland, and the United Kingdom responded. Finland and Switzerland specifically asked that explicit recognition be given the right of employees to refrain from membership in a labor organization.[119] The French government suggested that appropriate measures be taken to guarantee that the question of membership or nonmembership in a labor union would not be taken into account in the employment relationship.[120] In the *Conclusions* of its Report, the Committee of Experts[121] emphasized that while the objective of the proposed international regulation was restricted to a "guarantee of the positive freedom of association as a measure of social protection," nevertheless "the draft lays down only a right, and not, as certain countries seem to fear, an obligation. It follows, therefore, that workers and employers remain completely free to determine whether or not to make use of this right."

The 1949 meeting of the ILO resulted in what is known as Convention No. 87 on "Freedom of Association and Protection of the Right to Organize."[122] This Convention No. 87 was ratified by France on June 28, 1951, and with its ratification it turned in an interesting Report, which recounted that the French National Assembly had been presented with a bill intended to strengthen the guarantees of free trade union association which might be injured by *de facto* recruitment monopolies exercised by certain unions. The bill, as outlined by the Report, proposes that "Any refusal to hire a person or any discharge from employment which might be found to have been motivated by his opinions, trade union activities, or membership or nonmembership in a labor organization is an abuse. . . ." And it also provides that: "Any clause in a collective agreement in which the use of the trade union label by an employer is conditioned on agreement by the employer not to retain or not to employ any persons except union members, shall be null and void." The Report concluded with the statement that the officials of the French Government were in agreement with the bill, and that it had been approved by the Committee on Labor and Social Security and by the Press Committee of the National Assembly.[123]

Concerning the subject of this article, England follows neither the

[119] Report VII, International Labor Conference, 31st Sess., International Labor Office (Geneva, 1948), 66.

[120] International Labor Conference (31st Sess., 1948), Report VII, 60.

[121] The "Committee of Experts" is appointed under the aegis of the ILO.

[122] Convention No. 87 on Freedom of Association and Protection of the Right to Organize, Article I, Section 2(a).

[123] *Cf.* International Labor Conference, Report III (38th Session, Geneva, 1955), 66.

American nor the Continental pattern. Collective bargaining agreements are unenforceable in English courts.[124] Still, the unions in that country have insisted on compulsory unionism in some trades and industries and, of course, have had at their disposal for enforcement the customary and effective economic weapons. Although a union shop clause is not enforceable, it is not unlawful.[125] However, a strong current of public opinion, completely in line with traditional English emphasis upon concepts of freedom, is definitely hostile to such clauses. A recent article by the Lord Justice of Appeal, Sir Alfred Thomas Denning, expressed this hostility very sharply.[126] There are English experts who share in the opinion that compulsory unionism is obnoxious to unionism because compulsion does not appeal to the heart and the chances that it can command the voluntary allegiance of workers are slim.[127] The experience of New Zealand, a country where compulsory unionism is the norm, seems to lend support to that opinion.[128]

Finally, there is one legal element which aggravates the problem in our country but does not affect it in Europe. It is that purely American question whether or not the States are foreclosed from following their own policy with respect to terms and conditions of employment.

[124] Trade Union Act, 1871, 34 and 35 Vict. c. 31, §4(4).

[125] *Cf. Reynolds* v. *Shipping Federation Ltd.*, [1924] 1 Ch. 28, 29.

[126] Denning, "A British View of 'Right to Work' Laws," U.S. News & World Report, September 16, 1955, 142.

[127] Knowles, Strikes: A Study in Industrial Conflicts with Special Reference to British Experience 1911–1947 (Oxford, 1952), 47.

[128] Hare, Industrial Relations in New Zealand (1946), 198, referred to by Knowles, *op. cit., supra* note 127, 47.

BENJAMIN AKZIN

Codification in a New State

A Case Study of Israel

I

IT IS THE PURPOSE OF THIS PAPER to indicate some of the problems arising in a new state which, along with other activities incidental upon its consolidation and development, is engaged in a wholesale program of revamping and integrating the legal structure inherited from previous regimes. In the course of this process, codification and procedures akin to codification usually occupy an important place, and it is the complications appearing in this connection that will be reviewed here more particularly. The country against the background of which they will be studied is Israel. Inevitably, the specific context in which problems arise and solutions are sought, is peculiar to the state under study, and so is much of the factual material. Hence, neither the phenomena observed nor any lessons that might be derived therefrom are literally translatable into the experience of any other state. On the other hand, as long as this reservation is kept in mind, many of the problems, considerations or even solutions might be applicable *mutatis mutandis* to other countries, whether new or of older vintage. In this sense, the following might be regarded as a case-study in codification problems, albeit on a miniature scale.[1]

As it happens, the minute size of the country involved—a mere 8,000 square miles—does not make its case a simple one. On the contrary, extreme complexity of the social and legal background against which its efforts at codification are undertaken, is its outstanding characteristic. Another characteristic of the country is that it is replete with paradoxes. Only so much of the complexities and paradoxes involved will be mentioned here as is necessary to understand that which follows.

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[1]To some extent, the problems discussed in this paper are not unlike those faced by Turkey after the First World War. However, the approach and solutions adopted by the Turks at that time were quite different. See: L. Ostrorog, The Angora Reform, London, 1927.

Culturally, Israel represents a Western-type democratic and urban society in the midst of a rather patriarchal and rural Middle East. Ethnically, it is a society largely Jewish established in a territory which, in recent centuries at least, was predominantly Arab. Demographically, it is composed of several strata of inhabitants greatly differing from one another in religion, linguistic background, *mores* and—correspondingly—in inherited legal institutions. Most of Israel's present population are comparatively new arrivals, and their cultural integration is far from complete. From the point of view of dominant social values, it is a welfare state placed in a region in which social consciousness is perhaps as low as anywhere on earth. By no means unimportant is the country's character as central site of holiness for Christianity and Judaism, and as an object of deep veneration to Islam and two smaller denominations—Bahaj and Druze;[2] which helps to explain why large groups and political entities outside the state regard with jealous interest everything that occurs within its borders. And lastly, it is well to remember that the search for a better legal structure that will be described in the following pages, just as all other efforts at social and economic consolidation, is taking place while the state of war between Israel and every single one of its neighboring States continues unabated.

A similar degree of complexity characterizes the country's legal structure. Again, only the barest elements of that structure will be mentioned here. Independent since May 15, 1948, it is a unicameral parliamentary republic.[3] The principal layers which compose the authoritative legal material now in effect, are as follows:

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[2]This statement refers to Palestine (*i.e.*, Israel and the Hashimite Kingdom of Jordan) as a whole rather than to Israel specifically. As a matter of fact, most of the Holy Places of Christianity and all of the shrines venerated by Jews and Moslems lie in the part of Palestine held by Jordan.

[3]Declaration of the Establishment of the State of Israel, in: 1 Laws of the State of Israel (5708–1948) 3.

For the background of the State and a description of its governmental and social system, see: B. Akzin, "The Palestine Mandate in Practice," 25 Iowa Law Review (1939) 32–77; P. L. Hanna, British Policy in Palestine, Washington, D. C., 1942; B. Joseph, British Rule in Palestine, Washington, D. C., 1948; J. C. Hurewitz, The Struggle for Palestine, New York, 1950; J. Robinson, Palestine and the United Nations, Washington, D. C., 1947; B. Akzin, "United Nations and Palestine," in: Jewish Yearbook of International Law, (1949) 87–114; J. Dunner, The Republic of Israel, New York, 1950; H. Lehrman, Israel, New York, 1951; N. Bentwich, Israel, New York, 1952; G. de Gaury, The New State of Israel, New York, 1952; H. Sacher, Israel, New York, 1952. The best brief survey of Israel's governmental structure, with full bibliography, is: O. Kraines, Israel, Washington, D. C., 1954 (also published in 6 Western Political Quarterly (1953) 518–542, 707–727).

A detailed analysis of the country's legal structure is found, for the time being, only in Hebrew. See: G. Tedeschi, Mekhkarim Bemishpat Artzenu, Jerusalem 1952; and the issues of *Hapraklit*, the Law Review published by the Israeli Bar Association. For a descriptive survey,

1. Statutory enactments of the State of Israel and regulations made pursuant to these enactments.[4]

2. Quasi-statutory enactments of the period of British rule, 1918–1947, and regulations made pursuant to these enactments.[5]

3. Ottoman law, such as was in force in Palestine on November 1, 1914. As a result of a series of enactments in the 19th and early 20th centuries, this material was overwhelmingly statutory in form; a large part of it was codified. As for the historical origins of its contents, the provisions of that law are taken partly from Moslem religious law, partly from Turkish and Arab customs, partly from later local developments, and partly represent translations or adaptations from Western sources, chiefly French and German codes.[6]

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see: Sidre Shilton Umishpat, (ed. Z. Silbiger), Jerusalem 1953. See, however: U. Yadin, "Sources and Tendencies of Israel Law," 99 U. of Pennsylvania Law Review (1950–1951) 561–571.

[4]This material is published in the Hebrew and Arabic editions of Israel's Official Gazette. The early issues of the Hebrew edition bear the title *Ilon Rishmi*; since February, 1949 they are published under the title *Reshumot*. In English, there is available a collection of Laws of the State of Israel, published by the Government Printer, of which there have appeared hitherto volumes 1, 2, and 5. English translations of the more important statutes are also published annually in the Government Year-Book of Israel. Peaslee's Constitutions of Nations contains translations of a few basic statutes, but these have been considerably amended since then.

[5]None of these enactments are statutory in the full sense of the word, since they originate with administrative agencies—the King-in-Council and the High Commissioner for Palestine respectively. The enactments originated with the former are the Orders-in-Council; those originated with the latter are the Ordinances. The ultimate authority for these enactments was, according to the British conception, the (British) Foreign Jurisdiction Act., 53 & 54 Vict. (1890) Ch. 37; according to the Israeli conception—the Palestine Mandate, approved by the Council of the League of Nations in 1922 (44 Stat. 2184).

A consolidated edition of Orders-in-Council and Ordinances down to the end of 1933 is the three-volume collection of Drayton, Laws of Palestine, London, 1934. For later material, see: Government of Palestine, Ordinances, Regulations, Rules, Orders and Notices, published annually.

[6]The fullest, though not quite complete, collection of Ottoman law up to the time of its publication is found in: G. Young, Corps du droit ottoman, 7 vol., Oxford 1905–1906. Some more recent material has been published in: Législation ottomane, Paris (Jouve), 1912. Various collections of Ottoman laws have also been published in Cyprus and Iraq, where they continue to be in effect to a large extent.

Not all of this material was in effect in Palestine during the Mandate or remains in effect in Israel today. For the general place of Ottoman law in the legal structure of the country, see *infra*, note 7, reproducing Art. 46 of the Palestine Order-in-Council, 1922. Under the general reception clause enacted by the State of Israel in Sec. 11 of the Law and Administration Ordinance, 5708–1948 (see *infra*, note 11), this article still remains in effect. There is a volume (in Hebrew) by M. Laniado, A Compendium of Ottoman Laws in Force in Palestine, Jerusalem, 1929. The most important single part of Ottoman law still largely in effect is the *Mejelle*, a code of private law enacted *seriatim* between 1867 and 1877. An English translation of the Mejelle, together with notes and comments, forms the contents of: C. A. Hooper, The Civil Law of Palestine and Trans-Jordan, 2 vol., Jerusalem, 1933, 1936. A

4. "The substance of the common law, and the doctrines of equity in force in England."[7]

5. (As far as Jews are concerned)—Jewish (rabbinic) law, in matters of marriage, divorce and personal status. Developed from the Old Testament by centuries of theoretical writings and actual adjudication, the main body of that law has been set out in a succession of texts, most important of which are the Mishna (3rd century), the Babylonian Talmud (5th century), the Code of Maimonides (13th century) and the Shulkhan Arukh (16th century).[8]

6. (As far as Moslems are concerned)—Moslem religious law (sharyia), in matters of marriage, divorce and personal status. Developed from the Koran and early islamic traditions, it has been laid down by scholars and judges of the succeeding generations, and has never been properly codified.[9]

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particularly important field in which Ottoman law still governs is the field of land law. As to that, see: F. M. Goadby and M. J. Doukhan, The Land Law of Palestine, Telaviv, 1935; brought up to date and enlarged in: M. J. Doukhan, Dine Karkaot, 2nd ed., Jerusalem, 1953 (in Hebrew).

[7]Palestine Order-in-Council, 1922, Art. 46. The article, in full, states:

"The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman law in force in Palestine on November 1st, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders-in-Council Ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedures and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary."

As the text clearly indicates, common law and equity are to be regarded as subsidiary sources, and applied subject to various limitations. In practice, recourse to these sources was relatively infrequent during the first two decades of British rule, but became much more frequent during the third decade, and these sources have retained their importance after the establishment of the State of Israel.

[8]Much of the Talmud is available in an English translation, and a translation of the code of Maimonides is being published *serialim*, since 1949, by the Yale University Press. The Shulkhan Arukh, though translated into French and German, is not available in English; but an authoritative abbreviated edition of the code has been so translated: S. Ganzfried, Code of Jewish Law (transl. by Goldin), New York 1927. See also: I. Herzog, The Main Institutions of Jewish Law, 2 vol., London, 1936, 1939. A very elementary survey is: G. Horowitz, The Spirit of Jewish Law, New York, 1953. Of practical importance is: E. E. Scheftelowitz, The Jewish Law of Family and Inheritance and its Application in Palestine, Telaviv, 1947.

[9]For a general survey of Moslem law, see: J. Schacht, The Origins of Muhammadan Jurisprudence, Oxford, 1950; S. Vesey-Fitzgerald, Muhammadan Law, Oxford, 1931. A brief summary is contained in: A Symposium on Muslim Law, Washington, D. C., 1953.

7. (As far as certain Christian denominations are concerned, *viz.*— Roman Catholics, Greek Orthodox, Armenians, Syrian Catholics, Chaldean Uniates, Greek Catholics, Syrian Orthodox and Maronites)— Christian church law, in matters of marriage, divorce, and personal status. In the case of Roman Catholics and the denominations affiliated with the Roman Catholic Church, this law has been elaborated in great detail, and, moreover, has been the subject of a comprehensive modern codification, with the code, the *codex iuris canonici*, in effect since 1918. The church law of the Eastern denominations, while equally based on the Holy Writ, apostolic tradition, and the decisions of the early synods, has not been properly codified.[10]

8. (As far as the Bedouin tribes in the southern part of the country, the Negev, are concerned)—"tribal custom, so far as it is not repugnant to natural justice or morality" (Palestine Order-in-Council, 1922, Art. 45).

The formal source of the validity of the three religious layers, as far as the state is concerned, lies in the delegation of authority to religious tribunals as expressed principally in sections 51–55 of the Palestine Order-in-Council, 1922, as amended. It is clearly understood that, where the religious law of the respective community conflicts with secular law, the latter prevails, a relationship which is guaranteed in practice in two ways: (a) by the control which the civil courts exercise over the religious tribunals by various means, chiefly through the execution of the decisions of religious tribunals by the execution offices attached to the civil courts, and (b) by the power of the Supreme Court to issue orders akin to the

Numerous books on Moslem law have been published in India and Pakistan, where this law was in effect, before partition, for the large Moslem populations and enjoys today, as far as Pakistan is concerned, an especially important status. An example of this literature is: A. Fyzee, Outlines of Muhammadan Law, Calcutta, 1949. Numerous studies of the subject have also appeared in France and the Netherlands, where it held great interest because of the largely Moslem character of their colonial populations, and in Germany.

[10]The denominations specified above are those enumerated in the Palestine Order-in-Council, 1939, Art. 16. Not all of them have established their own ecclesiastical tribunals. As of the present, only three Christian denominations—Roman Catholics, Greek Catholics, and Greek Orthodox—have fully functioning ecclesiastical tribunals.

There is a very rich literature on the Canon Law of the Roman Catholic Church. Authoritative recent texts are: T. L. Bouscaren, Canon Law, Milwaukee, 1946; A. G. Cicognani, Canon Law, 2nd ed., Westminster (Md.), 1947. For sources on the legal systems of the Eastern churches, see Cicognani *op. cit.*, pp. 182–207.

While, in principle, religious law governs proceedings before the ecclesiastical tribunal of the respective community, under Art. 51–55 and 65 of the Palestine Order-in-Council, 1922, as amended, civil courts, too, are occasionally called upon to apply it, pursuant to Art. 47 and 58–64 of the Order-in-Council. Naturally, questions of conflict between the religious laws in effect often arise. See: F. M. Goadby, International and Interreligious Private Law in Palestine, Jerusalem, 1926; E. Vitta, The Conflict of Laws in Matters of Personal Status in Palestine, Telaviv, 1947.

orders of *certiorari* and prohibition. As between the second, third, and fourth layers, the order of precedence is laid down by Section 46 of the 1922 Palestine Order-in-Council, with mandatory enactments coming first, Ottoman laws second, and common law and equity brought in as a subsidiary source only. Uppermost, from the point of view of validity, are Israeli enactments, not only because of the maxim of *lex posterior*, but also because of an explicit statutory provision at the time of the "reception" by the new state of the older layers of law.[11] But this enumeration will not give a true picture of the situation, unless one bears in mind the practice of the civil courts, when applying and interpreting all these variegated materials, to follow the general spirit of the common law and of equity and, more particularly, the rules of interpretation derived from the common law, including the tendency toward a narrow construction of statutes, rigorous adherence to *stare decisis* and frequent recourse to older law.[12] In the light of this practice, common law and equity play a far greater part in the legal structure of Israel than might be guessed on the basis of the statutory and quasi-statutory material only.

II

The first complex of questions that had to be faced in Israel in connection with our subject, is the fundamental complex that can be summarized under the general heading—to codify or not to codify.

To a large extent, the various attitudes taken in this connection are determined by the meaning given to the terms "code" and "codification." The point involved is more than a mere exercise in semantics, for the meaning in which these terms are used determines the functions which the codes will fulfill on the legal scene, and it is the sympathy or antipathy with which the various factors involved view the proposed functions that will make them more or less receptive to codification. Because of this, it will be best to recapitulate, at the risk of being redundant, some elementary issues. It will be good to recall, in the first place, the two underlying respects in which all statutory law differs from non-statutory law, viz.—(a) that in statutory law it is a nonjudicial,—in our days, mostly a representative—agency that lays down and formulates the rule; and (b) that

[11]Law and Administration Ordinance, 5708-1948 (1 Laws of the State of Israel 7), Sec. 11: "The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities."

[12]Only once, to this writer's knowledge, has the Supreme Court of Israel expressly refused to take in consideration older sources when faced with later legislation. See *infra* p. 58 ff. and note 24. But this was definitely a departure from usual practice.

the rule is laid down *ab initio* for an indefinite number of future situations rather than in the context of a specific case and only secondarily applicable (depending on the strictness with which *stare decisis* is used) to future situations. As a further step in this development, codification is a form of statutory law in which a broad range of interconnected subjects is treated systematically and simultaneously in one document, as against their more or less fragmentized treatment in a series of isolated or sporadically enacted documents. But this purely procedural aspect, for all its practical importance, does not, of course, exhaust the significance of codification. As this term is invariably understood in civil law jurisdictions, it denotes a process after the completion of which there is, generally speaking, neither need nor justification for referring, for the purpose of ascertaining the law, to pre-code sources except in so far as the code itself may sanction such references. This does not mean that no recourse can be had to judicial decisions, but such decisions will be decisions arrived at under the code rather than prior to its enactment, and, whatever the extent of binding force or persuasive value that is ascribed to them in a given jurisdiction, they will be regarded as a secondary source at best rather than a primary source for ascertaining the law. In theory, this view is shared in Anglo-American law as well,[13] but in practice the traditional approach of the common law lawyer frequently overrides the theoretically acknowledged limits: quite often do judge and counsel in a common law jurisdiction handle the rule of a code as was their wont to handle a proposition contained in a fragmentary statute; *viz.*—as an added layer in the aggregate of positive law, to be construed, and rather narrowly construed at that, together with all other layers available, save insofar as some prior sources may have been explicitly repealed. At most will the code

[13]A number of judicial decisions in the federal and state courts in the United States, conveniently assembled in the various digests and textbooks, render homage to this view. This attitude has been summarized in 2 Sutherland, Statutes and Statutory Construction (3rd ed., 1943) 255 as follows: "The omission of previous laws from the code operates as a repeal of the law for after adoption of the code only the acts appearing in it are law." And further: "Where an official code purports to cover the entire field of regulation any prior law not included in the code is repealed. The fact of non-inclusion is sufficient to create the repeal and the law excluded need not be inconsistent with included material. Nor is it necessary that the code expressly repeal omitted materials. The repeal is an implied one resulting from the intent of the legislature to create a single, complete and exclusive body of law in substitution for all previous enactments." (*ibid.*, p. 257–258)

In England, no such attitude is discernible even in theory, and codes are regarded as but little differing from consolidation statutes. On the whole, the importance imputed to them does not go beyond that explained by Lord Herschell in Bank of England v. Vagliano Brothers (see *infra* p. 59 and note 25) in which the code-like statute is taken as a point of departure rather than as an exclusive repository of the law in effect. *Cf.* Craies on Statutes, 5th ed., 1952, p. 335; Maxwell on Interpretation of statutes, 9th ed., 1946, p. 26–27.

be regarded as complete in itself vis-à-vis older *statutes*, thus excluding reference to them. But as for the exclusion of older *judicial decisions*—such an operation represents, evidently, too much of a break with inherited habits of legal reasoning for many jurists steeped in the common law.[14]

It is in the light of this background of the problem that the basic difficulties surrounding the question of codification in Israel must be understood. The advantages of codification have been stated often and are particularly obvious in a country with so complex a legal structure as Israel; there is therefore no need to reiterate them in this paper. On the other hand, it will be useful to describe and analyze the chief factors that militate against codification or, to say the least, work to slow down its impetus and to reduce its intrinsic importance.

One factor of this kind is the attitude of members of the legislature and the cabinet. Their attitude has to do with the most elementary meaning of codification: the substitution of a systematic exposition of the law for fragmentary and *ad hoc* legislation. Indeed, it is a simpler task, at first sight, to enact rules piecemeal, if and as a specific problem urgently calls for a solution or for reformulation, and without undergoing the gigantic task of working out at once a major area of jural relations. This is especially true of many a modern parliament, and certainly of the *Knesset* in Israel. Even though the term "legislature" still figures pre-eminently in the designation of modern parliaments, the emphasis in their activities, especially in so-called "parliamentary" regimes, has shifted so definitely to nonlegislative tasks that there is no longer the leisure or, at any rate, the patience, to undertake a very broad and very complicated piece of legislation, such as is involved in the enactment of a code; this the more so as the problems involved are, in the main, removed from the points around which parties form and parliamentary life is centered.

The task could still be undertaken if the legislature were content with a more or less formal role, such as that played by the German Reichstag,

[14]The traditional attitude of Anglo-American lawyers toward statutes, including code-like statutes, has been described by Roscoe Pound in his classical paper on "Common Law and Legislation," 21 Harvard Law Review (1908) 383. Even though the opinion has occasionally been expressed that things have changed since 1908, the attitude described by Pound does not differ much from that which we find in C. K. Allen, Law in the Making, (3rd ed., 1939) 378 and 412–414. English and American case material abundantly illustrates the unwillingness of courts to look at codes and other statutes otherwise than in the context of common law and of earlier statutes and their readiness to cite precedent in support of the statute, even when following the statute. The melancholic conclusion of Sutherland that "with our Anglo-American legal tradition it is unlikely that we can anticipate the establishment of true codes in the American States" (*ibid.*, p. 249) seems fairly realistic. *Cf.* 52 Michigan Law Review (1953–54) 756.

the Italian Parliament, the Swiss Federal Parliament, the Dutch legislature, and the legislatures of several American States in connection with the codes enacted by them. But the *Knesset* is jealous of its legislative functions. Neither in plenary session nor in committee do its members like to pass legislation without careful scrutiny of contents or even of actual wording.[15] On the other hand, the *Knesset* is more interested in measures which respond to an urgent need or have obvious political or social connotations than in long-range and nonpolitical measures. As a result, it has already happened that when fairly comprehensive technical bills were submitted to the *Knesset*, even though far shorter than full-fledged codes usually are, the committees concerned never got around to dealing with them. *A fortiori* this attitude is bound to discourage the introduction of complete codes.

To a lesser extent, but still perceptibly present, the same attitude can be detected in the responsible heads of the executive. As far as Israel is concerned, there is discernible a veritable zeal for gradual codification (in the sense of a systematic exposition of statutory law, whatever their attitude as regards the relationship between the *lex scripta* and the *lex non scripta*) on the part of the officials of the Ministry of Justice entrusted with the preparation of long-range legislation,[16] and to a certain extent this attitude characterizes also the present holders of the offices of Minister of Justice and of Attorney-General.[17] But there it stops. Under Israeli practice, every government bill is submitted to the cabinet for approval before introduction in the *Knesset*, and the cabinet operates in an atmosphere not unlike that of the *Knesset* itself. Attention is focused, here no

[15]Paradoxically, the unwillingness of the members of the legislature to forego the opportunity for a careful scrutiny of "legal" bills goes hand-in-hand with a certain lack of interest in these bills. *Cf. infra*, p. 67.

[16]There is, in the Ministry of Justice, a Section for Legal Planning, which is especially charged with the preparation of code-like legislation and other bills of a long-range character.

[17]To avoid misunderstandings, it should be explained that, in an apparent attempt to bring about a synthesis of the English, American and European practice, the Ministry of Justice in Israel is headed by two officers rather than by one. The Minister of Justice is a cabinet member, usually a member of the Knesset, and not necessarily a legal expert. The second-in-command in the Ministry is an official whose title is "Legal Adviser to the Government," loosely translated into English as "Attorney-General." The position—not a civil service position, but with a tendency toward permanence—is filled by a prominent lawyer, who acts as principal law officer of the government, heads the machinery of public prosecution, often participates in cabinet meetings (without vote), and has numerous other functions. In certain respects the Attorney-General acts as the Minister's subordinate, in others, he is independent of the latter; further clarification of the dividing line between these two areas might be useful.—There is no office in Israel corresponding to the Lord Chancellor in England: the Minister of Justice is not a member of the judiciary, does not preside over a legislative body, but has a greater measure of control over the Department and over the administration of the courts.

less than there, on urgent matters and on political issues. Hence, a disinclination to take up comprehensive long-range bills of a highly technical nature, matched by an equal disinclination to pass on such bills to the *Knesset* without the usual scrutiny.

And yet it would be an error to believe that the above phenomena are due entirely, or even principally, to the mere convenience, whim, or faulty working methods of legislature and cabinet. We will not stray far afield if we assume that basically it is the greater dynamism and the speedier tempo of change of modern life that exercise an influence away from long-range and comprehensive legislation and toward immediate and piecemeal law-making. This is particularly characteristic of the extremely dynamic State of Israel, but it may be of interest to investigate whether the same situation does not obtain in other States, especially in other new States, as well.

It has been said often, since Savigny, that codification or, at any rate, successful codification, is predicated on a certain stage of "ripeness" of a country's laws. One wonders whether this is necessarily true: codification, especially in the sense of a wholesale reception of foreign legal material, can be, on the contrary, the result of a grossly inadequate state of the country's laws—as was the case on the eve of recent codifications in Japan, Egypt, and Turkey. Far more apposite than the requirement of a "ripe" legal structure is another condition: a suitable climate of society, its willingness and self-denying ability to conform to an all-embracing body of rules the ultimate import of which cannot be easily gauged in advance; a condition which requires the added readiness either to undertake the laborious preparation of an original code or to "receive," ready-made and in a spirit of humility, a foreign product. Where this condition is not fully present, and this seems to be the case in Israel, the path of codification is far from smooth.

A second major factor is the specific professional attitude of the members of the legal profession, resulting from their training, mental habits, and perhaps not uninfluenced by professional interests. It is here that the struggle between the common law and the civil law approaches is most discernible in Israel. Numerically, the legal profession in Israel is about evenly divided between those who received their legal training in various continental law schools and those whose legal training was influenced predominantly by the common law.[18] But in fact, exposure to British-controlled courts under the Mandate, the need to pass a bar examination in, and to apply in practice, a large body of law modelled upon British

[18]The above is merely an approximate estimate based on personal observation. Attempts by the writer to obtain precise statistical material were not successful.

law and interpreted in accordance with common law canons, have exercised a profound influence on "continental" jurists as well, so that, today, we find a great many of them including many of the most eminent members of bench and bar, who have become genuine and even enthusiastic converts to the common law approach. All in all, therefore, it is the common law school that is far more influential in Israel than the civil law school.

The result is the familiar lack of complete acceptance, typical of the common law jurist, of statutory law generally and of code-law in particular. Statutes are to him an added layer, to be read together with the prestatute material, to be interpreted in the light of that material, and to be narrowly construed wherever departing from the earlier rule. Both because the common law method predisposes one to casuistic solutions and against broad principles, and because common law jurists would like to hold down to a minimum the intervention of statutes in the domain of the common law, they tend to prefer fragmentary legislation to more comprehensive statutes. And when confronted with statutes of the latter kind which might be commonly called or even officially entitled "codes," they still apply and interpret them in the same manner in which they would apply legislation of the former kind: as another piece stitched on to the pre-existing legal structure. One might even say that, where in the classical common law countries, England and the United States, a change of attitude can be denoted, and codification finds numerous advocates,[19] the Israeli common law jurist, with the enthusiasm of the neophite, is even more devoted to a technique which he has so recently acquired, and is therefore even less disposed to see its sway seriously interfered with by a fully implemented system of code law, with all the latter's implications.

A further element in the situation is that statutes generally, and codes more particularly, by stating broad principles obviously intended to govern future situations rather than proceeding by way of reasonings which can be held to constitute *obiter dicta* or restricted to a narrow specific set of facts and therefore not binding in future cases, seriously narrow down the scope of the "fluidity" or "elasticity" with which courts can vary their decisions by way of "interpretation" and "distinction." However resourceful civil law courts have been in developing new law under codes—with the French law of torts being the most renowned example—there is still a far stricter limit to their freedom of action in this respect where codes and statutes furnish the primary source of their jurisdictional powers, than is the case where codes do not exist, or are not regarded as

[19] *Cf.* Salmond's Jurisprudence (8th ed., 1930) 180; 3 Sutherland, *ibid.*, 171–176, and American cases cited therein.

excluding the application of prior sources, or where they are regarded as ancillary to judicial precedents. In addition, there is a basic difference between a situation where the extra-code material applied, largely the *jurisprudence des tribunaux*, is post-code, and flows from the authority of the code, and a situation obtaining where this material is largely ante-code material in the light of which the code itself is read and interpreted. All in all, *stare decisis*, with the opportunity which this doctrine gives to the judge to "distinguish" on however minute grounds, is far less of a restraint on a judge in a specific case, precisely because it is meant to be less of a restraint, than is a section of a code or of a broadly interpreted statute which is intentionally designed to apply to sets of facts, however varying in detail, as long as they fall under the common denominator.

Here again, one may note the contrast between the older common law countries—England and the United States—in which there is a growing tendency toward true codification and toward the broad construction of statutes, and Israel. Many Israeli jurists, having, as it were, newly discovered the unrivalled opportunities for refined casuistic reasoning and the relative freedom of argumentation which the common law approach affords to both judge and counsel, are rather enamored of it and are reluctant to go back to the relative narrowness of argument open to counsel and to the narrow scope of discretion left to the judge in a code-governed civil law system. It is more work, but it is also more fun, to be a common law jurist. And one wonders whether the higher social prestige which judges enjoy in common law jurisdictions, is not a faithful mirror of the fact that they are expected to fulfill a more creative function in the body politic than their civil-law brethren. And as for those jurists in Israel who are themselves products of the common law school, once placed in this arena where the approach familiar to them has to compete against civil law influences, they often assume—whether out of habit or because of a sense of loyalty—the role of defenders of the common law against civil law encroachments in various forms, including the encroachment by codification in the continental sense of the word.

But here, too, it would be far too superficial to put down the reluctance to codify as due mainly to personal inclination. Serious objective considerations are involved, indeed, in this struggle. There is, first of all, the weighing of the advantage of greater "predictability" of the law under a code system[20] against the advantage of greater "elasticity" and there-

[20]The writer may be permitted to venture the opinion that the very preoccupation of American legal scholars, especially those of the "realistic" school, with the problem of the predictability of the law, a problem almost ignored by their European brethren, merely reflects an existing contrast: by definition, court decisions based on codes and statutes are

fore the greater opportunity given to the judge to insure substantive justice in the specific circumstances of a given case under the common law. There is, further, the weighing of the advantages of the more complete observance of the legislator's monopoly of law-making under the code system, against the advantage of a somewhat freer hand given to the judge to devise, as a presumably non-political well-trained expert, timely refinements and adjustments in the law of the land. And arising from the latter, there is, finally, the advantage that the will of the legislator will be obeyed by the courts in every single case until he, the legislator, speaking for the sovereign people, will deign to change the rule, as against the advantage that, where the application of that rule would go against the court's sense of justice and where its modification by legislative procedure would come too late, the court itself, by a judiciously "narrow" interpretation of the rule, may perhaps exclude a given case and other similar cases. One might say that two major problems are involved in the struggle over codification: on the one hand, the social values of stability and predictability v. elasticity; on the other—the relative importance, in the legal domain, of the essentially political modern legislator and the presumably nonpolitical expert, the judge.

As a result of the foregoing considerations, the attitude of important segments of the legal profession in Israel is such as to make them prefer casuistically worded statutes to statutes setting out broad rules, fragmentary statutes to comprehensive codes, and codes of a largely declaratory character which permit going back to pre-code sources to exhaustive codes which nullify all previous law from any source whatever. Where the legislature is slow to codify principally for pragmatic reasons, the legal profession, as we have seen, has a certain "ideological" bias against codification.[21]

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more predictable than those based on common law and *stare decisis*. Hence, there is less need in a continental system to worry about certainty and predictability.—Interesting observations on the subject of the relative freedom of the courts under the two systems are made by W. Friedmann, Legal Theory (3rd ed., 1953) 370 ff. While Professor Friedmann's admonition against exaggerating the freedom of the Anglo-American judge and the limitations on the continental judge is fully justified, it is equally important, however, not to ignore the very real difference existing between judges in the two systems in this respect.—For a well-balanced view on the place of the courts in the development of civil law, see: F. Deak, "The Place of the 'Case' in the Common and the Civil Law," 8 Tulane Law Review (1933–1934) 337–357; and see the literature cited *ibid.*, 340 note 6.

[21]The distinction between the motives of legislators and those of lawyers is particularly valid in Israel because, as distinct from most Western-type States, lawyers constitute but a minute element in the legislature. At the time of this writing, there are barely a dozen Knesset members with legal training out of a total of 120 members. The non-identification between politician and lawyer is an important feature of the Israeli governmental system.

In the special field of the law of persons, one more factor exercises a restraining influence on codification. It has been noted that this field is largely governed by religious law and administered by autonomous ecclesiastical tribunals (though subject to the control of the civil courts). Codification by the authority of the state represents, therefore, in this field more than mere restatement or even legislation *de novo*. It connotes the direct and complete substitution of state-made law for rules which owe their intrinsic authority to the respective religious systems and are merely "recognized" or "received" by the state. Though in the West, this process of secularization of the law has gone very far and is now regarded as normal even in many a Catholic country, in the Orient this process has no such uniform record of progress. In Israel, traditionally the "Holy Land," sensitivity in this sphere is particularly intense. While large sections of the population and most members of the legal profession wish for a modern secular law, attempts to dislocate religious law are regarded in the light of a serious interference with religious beliefs, social *mores*, and vested rights by no less than three influential groups: orthodox Jews, Moslems, and Christians. What renders the situation even more delicate is the fact that each of these groups within the country has the support of still more influential and extremely vocal groups outside of the country.

Despite these restraining factors, the same pressures which increasingly force statutory law and codification upon other countries, exercise their influence in Israel as well. These factors are, as we have seen, the complexity of legal sources, the need to ensure greater predictability and certainty of the law, and the innate search of the human mind for system and congruity. In democratic states, a further factor has to be added, *viz.*—the basic assumption of the pre-eminence of the people's representatives over the trained élite. Therefore, while the considerations described above slow down the process of codification in Israel, its continued progress seems to be fairly certain. The principal questions that still remain open have to do with the kind of codes that will emerge, with the technique of their preparation, and with the relative importance of the codes in the legal structure of the state.

III

It is this latter question—the relative importance of the codes—that we shall take up now. Objectively stated, the question may be formulated as concerning the relationship of a code to pre-code sources in the absence of explicit repeal or reception. But unless this relationship is to be laid

down by the legislature—a rather unlikely and hardly desirable contingency—it will be the courts that will determine it by the manner in which they will, or will not, take cognizance of those other sources in their decisions rendered under the code. In the last analysis, were the courts in Israel to accept the philosophy of a codified law with all its implications, even the form and technique of judicial decisions would have to be changed from that used in common law countries to that practiced in civil law systems.

Since the proposed codes now in various stages of preparation have not yet become valid law, it would be premature to scan the decisions of Israeli courts for indications of their future attitude on that score. All that can be said is that to date, when dealing with matters governed by some fairly comprehensive mandatory enactments which might be regarded as partial codes,[22] no tendency has been evidenced by the Israeli courts to modify the style and technique of their decisions from those of a court of common law or equity. In one case only did the Supreme Court of Israel veer toward the view that a code-like enactment is relatively exhaustive and need not be read in conjunction with extraneous sources. It was a case involving the Interpretation Ordinance of 1945,[23] and the Court stated there that

> . . .we have to presume that the Interpretation Ordinance, 1929, and thereafter the Ordinance of 1945, contain the provisions according to which we must interpret the laws of this country. . .
>
> . . .The Interpretation Ordinance, by its very nature, must be interpreted on the basis of its own contents. Such a statute, by its very essence, stands on its own feet and does not require interpretation in the light of other interpretation statutes. An interpretation statute which requires interpretation in the light of foreign interpretation statutes or in the light of legal history will not be worthy of its name.[24]

It then went on to cite with approval the opinion of Lord Herschell in

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[22]One of these enactments even bears officially the title "code", *viz.*, the Criminal Code Ordinance, 1936.

[23]Quasi-statutory enactments of the High Commissioner during the Mandate are known as "Ordinances," as explained above. The name was retained for enactments made by the first legislature of Israel, the Provisional Council of State, from May 1948 to February 1949.—The Interpretation Ordinance itself was subsequently published in a revised form on January 1, 1954, pursuant to Sec. 16 of the Law and Administration Ordinance, 5708-1948, as amended. *Cf. infra*, notes 39 and 40.

[24]Kvutzat Poalim Lehityashvut Shitufit Veakh. v. Bet Din Lesafsarut Veakh. (Workers' Group for Co-operative Settlement *et al.* v. Price Tribunal *et al.*) 5 Piske Din (1951) 113, 131–132.

Bank of England v. Vagliano Brothers,[25] one of the classical statements in Anglo-American law as to the manner in which courts ought to apply codes. According to that statement, a judge, in examining the language of a code, is "to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view;" and Lord Herschell further admonishes that "an appeal to earlier decisions can only be justified on some special ground." Having done this, the Israeli court continues:

> There is no need to explain at length that his words apply *mutatis mutandis* to our problem as well. The Interpretation Ordinance too will be perfectly useless if, instead of examining its wording and searching for its plain meaning, we shall open an inquiry in the history of the rule in question in this and in other countries and, as a result of this inquiry, will give to an explicit section a meaning different from its plain meaning.[26]

As we see, the Court does not entirely forego resort to earlier and extraneous sources, but only recommends their avoidance in the absence of special grounds. It should also be considered that while Lord Herschell's opinion bore directly on the relation of a code to a rule of law previously in effect in the same jurisdiction, and while the Israeli Court includes in its reasoning resort to "legal history"—a broad expression which might apply to anything at all, the actual argument before the Court concerned resorts to analogous *foreign* (*i.e.* English) statutory material rather than to previously valid law of the land. Therefore the court's conclusion does not necessarily extend to a case where the principal issue concerns interpretation of a code-like provision in the light of a prior statute or of a common-law principle which had been in effect in the same jurisdiction. Furthermore, while the English case cited involved a codified provision of substantive law, the matter before the Court concerned a statute of interpretation, and, if it so desires, the Court can easily "distinguish" that case from any case in which the code-like enactment deals with a different subject-matter. Finally, it will have been noted that even while laying stress on the self-sufficiency of the Ordinance, the Court did not withstand the temptation to cite a decision of the British House of Lords, so that in the final analysis one could maintain that it is a common law

[25] A. C. (1891) 107, 144.
[26] 5 Piske Din (1951) 134–135.

rule of interpretation that governs the interpretation of codes in Israel after all.

Nevertheless, the opinion indicates a tendency toward ascribing to a code-like enactment a certain quality of completeness and exclusiveness, and this tendency makes the opinion interesting despite its uniqueness. It is only to be regretted that the opinion was written in connection with the Interpretation Ordinance, a rather brief and sketchy document which by no stretch of imagination can be said to exhaust the subject-matter. The "presumption" that its provisions suffice for the interpretation of the country's laws is untenable, since the Ordinance in question is neither complete nor systematic, and therefore falls short of the most elementary requirement of even a partial code. No attempt was made in other decisions of the Supreme Court to adhere to the above view, and numerous are the cases, both before and after the decision cited, in which common law canons of construction are applied to the interpretation of Israeli and mandatory legislation.

The decision is unique also for another reason: while the Interpretation Ordinance does not state anything regarding the relevancy of extraneous sources to its own interpretation, some other code-like enactments of the mandatory period explicitly posit this relevancy. Thus, Criminal Code Ordinance, 1936, sec. 4:

> This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English law and shall be construed in accordance therewith.

Similarly, Civil Wrongs Ordinance, 1944, sec. 2 (1):

> The Interpretation Ordinance shall apply to this Ordinance, and subject thereto, it shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English law and shall be construed in accordance therewith.

Now, both of these ordinances are far more complete in relation to their subject-matter than is the Interpretation Ordinance and are therefore far more susceptible to be regarded as "codes." Nonetheless, their interpretation in the light of an extraneous source is expressly provided for. It is true that only English law is mentioned here, and that it is mentioned for purposes of interpretation only. But this one reference suffices

to open the door for the introduction of other sources as well, and for their application as material law to boot, whenever English principles of interpretation permit this. In the case of the Civil Wrongs Ordinance, it is interesting to note that the Interpretation Ordinance is referred to, but is obviously regarded as insufficient. But even where no express provision as to interpretation has been made in comprehensive mandatory enactments, the courts of the Mandate, and to even a greater extent the courts of Israel, have been reading and interpreting these documents in the light of Ottoman law, prior mandatory enactments, and the rules of the common law and equity, apparently in reliance on sec. 46 of the Palestine Order-in-Council. Copious references to judicial precedents based on those sources, are made by the courts in current cases in the familiar manner of English and American judges, and these precedents are treated, in accordance with common law doctrine, as an authoritative formulation of the law in effect.

The question before the draftsmen and legislators in Israel is to what extent they should follow established usage, regard future codes as merely another layer of the law of the land, super-imposed upon the earlier layers but allowing for their continued validity, and to what extent they should regard the future codes as self-sufficient repositories of the law of the land, until such time as the courts, acting under the codes, may develop additional refinements; if the latter attitude is taken, it would follow that reference to pre-code material in general and to older precedents in particular would be discouraged. It is impossible to know what the legislator will do in this respect. As to the draftsmen, we have available to us the two major projects of codification in Israel which, though not yet introduced as bills in the *Knesset*, have already undergone several changes and can be regarded as finished products,—the project of a law of succession[27] and the project of a law of evidence.[28]

The project of the Law of Succession contains, in Sec. 149, a repeal clause which repeals specifically several previous enactments. There is no general provision to the effect that the projected code will be the only valid source in respect to the subject-matter. A provision tentatively inserted in Sec. 151 of an earlier, 1952 version of the project, repealing

[27]English translations of the text and explanatory notes of two successive versions of the bill, the original 1952 version and a 1953 revision, have been made by the Harvard Law School—Israel Cooperative Research under the name "A Succession Bill for Israel", in 1952 and 1954 respectively. *Cf.* U. Yadin, "The Proposed Law of Succession for Israel," 2 American Journal of Comparative Law (1953) 143–155.

[28]The text and explanatory comments of the project have been translated in 1953 by the Harvard Law School—Israel Cooperative Research under the name "An Evidence Bill for Israel."

"any other law repugnant to this law," is omitted from the later 1953 version, and the "Comment" accompanying Sec. 151 of the 1952 version vividly illustrates the scruples which the authors of the project had when proposing to do away with older law. In some cases, abrogation of earlier law appeared undesirable, as the authors of the comment correctly stated, when the respective provisions governed certain situations outside of the province of succession, and in those other situations it would not do to produce a vacuum. As far as the province of succession is concerned, one might assume that earlier law, where conflicting with the code, would not apply, under the principle of *lex posterior*, even if this were not stated in the code. But the real difficulty does not arise in cases of clear conflict, but in cases where the construction of the code is in doubt. Should it be construed narrowly, in such cases, so as not to conflict with earlier law, and should earlier law therefore continue in effect to that extent, or should the code be construed broadly so as to exclude earlier law? On this point, the project remains silent, nor do the comments and notes to both versions afford clear guidance. And nothing at all is said in the text that would resemble the doctrine of the *Workers' Group* case, in the sense that the Project be regarded as the exclusive and complete repository of all law pertaining to the subject, and that no earlier law, whether conflicting or not, need be considered at all. Several passages in the introduction and the comments to the project, cited hereinafter, indicate that the idea of such an exclusive and comprehensive character of the projected code was present in the minds of the draftsmen, but they did not go so far as to give expression to it in the text itself.

The above is correct with one very important exception. Ottoman law, mandatory enactments, and the law of the various religious communities might perhaps continue to apply to some extent,[29] but not so the common law. The 1952 version of the project went somewhat further in this respect

[29]However, the authors of the Succession Law Project propose to amend the 1922 Palestine Order-in-Council by deletion of the words "succession, wills and legacies, and confirmations of wills" from Art. 51 and 54 of the Order-in-Council (Sec. 151 of the 1952 Project; Sec. 149 of the 1953 Project). This deletion would have for effect to exclude these matters from the jurisdiction of ecclesiastical tribunals altogether. The intention of the authors of the project is, of course, to substitute secular law for religious law. Thus, the comment to Sec. 151 (b) of the 1952 Project:

> The absence of a law of succession, *i.e.* a secular Israeli law that deals fully with succession matters, is one of the major causes for the division of jurisdiction in these matters between state courts, religious courts and foreign consuls and of the multifarious application of general domestic laws, the laws of the religious communities and of foreign countries. Upon enactment of the new Law there will be neither room nor need for these complexities because "successions, wills and legacies" will be withdrawn from the matters of personal status. . .

than does the present 1953 version. Sec. 151 (c) (1) of the 1952 version stated that "in matters of succession, Art. 46 of the Palestine Order-in-Council 1922–1947, shall not apply." That article, as will be remembered, directs the civil courts to apply Ottoman law and mandatory enactments as well as common law and equity. But the 1953 version excludes only English law and excludes it only for purposes of interpretation: Sec. 151: "This Law shall be interpreted without reference to English Law." Nothing is said about the applicability or nonapplicability of English law, to the extent to which it was formerly in effect in Palestine, for purposes other than interpretation, and nothing is said about the applicability or nonapplicability of other prior sources, either for purposes of interpretation of the code or as supplementing the code in relation to questions on which the code does not carry conflicting provisions. Where so much vagueness is present in the text, the ultimate decision as to the continuing importance of pre-code material will lie with the courts.[30]

Nor does the second major codification effort—the project of a Law of Evidence—contain a full answer to the questions involved. The first two versions of that code, proposed respectively by the majority and the minority of a committee of experts appointed by the Ministry of Justice, do not go into the question at all, save for a remark in the comment to the minority recommendation which indicates that the continued validity of certain extra-code materials was taken for granted by the authors of that recommendation.[31] The latest version, prepared by the

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[30]It may be interesting to reproduce here the comment to Sec. 151 (c) of the 1952 Project:

> Pursuant to Art. 46 of the Order-in-Council the courts decide cases pursuant to Ottoman law, mandatory legislation and the principles of common law and doctrines of equity in force in England. These three sources of Palestinian law—and pursuant to Sec. 11 of the Law and Administration Ordinance, 1948, also of Israeli law—will no longer apply in matters of succession. Instead, the new law, a basic [wrong translation; "original" is the correct translation of the Hebrew term used—B. A.] law of the Knesset, will apply exclusively. In this area, therefore, the existing link with the laws which the Ottoman and mandatory powers have imposed on the country will be severed. This does not mean that Palestinian decisions rendered during the mandatory period and Israeli decisions from the establishment of the State until the enactment of this Law or English decisions of any period will no longer serve the courts as guide posts and sources of enlightenment. However, instead of being a part of existing law or serving as binding authority, they will henceforward be only persuasive authority; in other words, they will command the same degree of authority as legal sources of other countries and of Hebrew law, to the extent that these sources are capable of aiding in the interpretation of the new Law.

But in view of the significant change introduced in the text of the 1953 Project, it is more than doubtful whether this far-reaching comment still reflects the meaning of the authors of the project and whether, in any case, it may still meaningfully explain the new text.

[31]Advisory Committee on the Reform of Civil Procedure. Minority Report. Comment:

> However, this Law will not repeal the pertinent chapter of the Rules of Civil Procedure of 1938, for in the opinion of the authors of this Bill, this opportunity, too, should be preserved. . . (An Evidence Bill for Israel, p. 88).

Ministry of Justice in 1952, merely states, in Sec. 110, that "the laws set forth in the first column of the appendix to this law shall be repealed to the extent set forth in the second column," and that one specific Ottoman law "shall no longer apply." In the comment to that section, the authors give the impression of going much further. They state that "this Law will replace the common law of evidence as applied in Israel under Art. 46 of the Palestine Order-in-Council of 1922. However, various provisions dealing with the law of evidence are scattered over a number of ordinances, rules and laws. They also will be repealed upon this Law's coming into effect." It is doubtful, though, whether their prediction as to the common law of evidence will be upheld by the courts of Israel, since neither the text nor the appendix to the project rule out the applicability of Art. 46 of the Order-in-Council and therefore of the law derived therefrom. On the face of it, Sec. 110 of the project merely invalidates such prior laws as are enumerated in the appendix. It is quite conceivable therefore that judges, if confronted with this text, will hold that other prior law is applicable save where conflicting with the code. This interpretation is strengthened by the language of Sec. 111 ("Whenever another law permits or requires the making of any statement under oath, such statement shall be made after caution . . .").

But whatever position is proposed by the draftsmen and adopted by the legislator, in the final analysis the problem will not be solved one way or another until the courts will indicate by the technique and trend of their future decisions whether they are willing to accept to the full the logical implications of codification or whether, like their brethren in England and the United States, they will stop short of these implications.

IV

The next complex of questions concerns the contents of the proposed codes. Should they represent in the main a restatement of the law of the land, with revisions here and there so as to assure greater congruity of details, a measure of integration and some modernization, but principally retaining the character of a compilation? Or should they furnish an occasion for thorough-going changes and far-reaching innovations?

As far as Israel is concerned, the answer to this question seemed obvious from the beginning. Those who doubted the need for radical changes in the law of the land, were also skeptical of the very idea of codification. They were found mainly among the extreme protagonists of British legal institutions, and to them contents of the law—and its specific form—the form of a noncodified and often nonstatutory common law—were

inextricably bound together. When the decision was taken to take up gradual codification, this spelled also the spirit in which the codification would be undertaken—a spirit of far-reaching change.

This, however, does not give us any indication regarding the specific direction of the change, the social purposes which should determine it, and the material sources whence solutions and formulations should be drawn. As to sources, all three imaginable possibilities, and their various combinations, were thought of. In the best traditions of Savigny and the historical school, serious efforts were made and are still being made, to go back to Jewish sources and to develop a legal structure based on the specific *Volksgeist* of Israel. In practice, this means drawing upon the rich resources of Jewish religious law, also known as talmudic or rabbinic law. These efforts are enthusiastically supported by the religious-minded part of the Jewish population, since the development of rabbinic law, even in its purely secular phases such as agency, procedure, contracts, torts, proceeded by way of *responsa*, rule-making and actual decisions by scholars whose authority derived from religious sources. Historic Jewish law is therefore, except for some isolated matters, sanctioned and hallowed by religion. But the appeal of rabbinic law is not limited to religious circles only. To some less religious or nonreligious elements, too, building on the basis of rabbinic law appears the right solution, since it is in that and in no other legal system that the legal genius, the juristic *Volksgeist*, of the Jewish people is to be found. The protagonists of Jewish law, therefore, advocate a system of codes following as closely as possible the institutions of Jewish law. At the extreme wing of this group are those who deny altogether the need for secular codification in most fields in which there exists a developed system of rabbinic law (i.e., broadly speaking, in private law), and see such an activity needed only in those spheres (criminal law, public law, conflicts, corporations, procedure) in which no such detailed and developed system has been prepared by rabbinical authorities. However, this extreme view is neither very representative nor very influential.

A second school of thought goes to the other extreme and wishes to do what a number of modern nations have done, *viz.*—to adopt wholesale some good modern code of some other country. Presumably because in Anglo-American law codes are never regarded as embodying the whole law, and their adoption without the accompanying reception of the unwritten assumptions and principles of Anglo-American law would falsify the original, not even the greatest devotees of the common law have suggested the reception of any of the codes adopted in any common law

jurisdiction. Another reason for this omission may well lie in the fact that most significant common law codes are American, whereas most Israeli common law adherents follow the British version. Now and then, though, one finds the thought expressed that the wholesale reception of the best modern continental codes, a procedure adopted by so many nations in Latin America, Eastern Europe, and the Orient, might prove the simplest solution for Israel as well.

A third school prefers to seek perfection, and proposes to do so in the most difficult manner of all: by way of writing codes *de novo*, on the basis of a comparative and critical survey of all possible sources, including existing local law, English and American law, the continental legal tradition, and Jewish law, borrowing freely from all of them wherever possible and devising original solutions whenever necessary.

A sincere effort was made by the Ministry of Justice to go the first way and thus work out a law that would express the "national spirit" in Savigny's sense, and at the same time remain true to forms which have received religious sanction. However, by now most influential participants in the work of codification seem to have reached silently the conclusion that modern society requires a legal structure more directly influenced by the great Western legal systems. There is still every inclination to introduce selected elements, and especially nomenclature, from Jewish sources whenever practicable, but no longer is there any serious thought of making these sources the general framework for the future Israeli codes (except in those fields where it is desired that the religious law should continue to govern social relations, but then no one proposes codification by a secular authority in those fields). Still less attractive to most Israeli jurists is the idea of the "reception" of any French, Italian, Swiss, or other modern codes of foreign nations. The opposition to this idea is a double one. It stems, on one hand, from the advocates of the common law and, on the other, from a certain intellectual pride which does not take kindly to the idea that the ancient Jewish people, so steeped in a rich juristic tradition of its own, should give up any claim to original thinking and should simply copy the legal institutions of another nation. It is not that these modern codes were examined with a view to their adoption and found wanting, but that there is no disposition to examine them with a view to wholesale adoption.

There remains therefore only the third way of laboriously comparing texts and solutions, picking and choosing, and occasionally adding altogether new elements. It is a difficult road, and yet it is the road along which the preparatory work of codification is now firmly proceeding in

Israel. Within this method, there is plenty of room for choice of material, and British statutes, American codes, Jewish and continental texts vie for pride of place and for acceptance as points of departure. Because of greater familiarity of Israeli jurists with British materials, these enjoy an initial advantage. But of late, partly because of the better channels of contact between Israeli jurists and American centers of learning, of which more anon, American texts are rapidly gaining in influence.

As will be readily conceded, the work of codification cannot proceed without reference to social purposes and values. If anything, there is room for surprise that the influence of these factors—in our days of deep ideological cleavages and fierce partisan loyalties—is not stronger than it is. It seems, however, that except where major postulates of public law are concerned, the problems aroused by law-making and codification are of a technical nature rather than motivated by ideology, and are relatively little affected by struggles such as between socialists and adherents of private enterprise, between devout believers and free-thinkers, between partisans of a "strong state" and liberals, between authoritarians and democrats, between Jews and Arabs, or between representatives of competing economic interest groups. On those infrequent occasions when legal questions without obvious political implications have come before the *Knesset*, it was observed that most parliamentarians treated them with utter lack of interest, leaving the debate almost entirely to the few lawyers among them. And it was also observed that the debate between the lawyer-parliamentarians in these cases, contrary to the usual rigid demarcation line existing between parties in the Israeli legislature, tended to upset party lines, so that it assumed the character of a debate between legal technicians differing on the basis of their respective legal training and technical experience rather than one between different politically motivated viewpoints. These observations, it is true, have been made *à propos* of fragmentary legislation of a legal character, but there is no reason to doubt that something similar will hold true of the work of codification. In the present preparatory stage of codification, technicians are left to fight out among themselves any controversies that need fighting out. And it stands to reason that if and when the legislative stage is actually reached, it will again be the few lawyers in the legislature that will pay more than a cursory interest to the draft codes.

Nonetheless, there are points, even aside from fundamental public law problems, in which social values and purposes play a noticeable role. In a hotly conducted debate, during which the matter was treated as a moral and social rather than a legal problem, the *Kresset* adopted on

February 16, 1954, a law abolishing the death sentence for murder[32] (except in cases of murder covered by the Law for the Punishment of Nazis and Nazi Collaborators).[33] Presumably, the framers of a revised penal code which is now in the first stages of preparation, will accept this value-judgment as a guide in their work.[34] In another case, laws were adopted, against the strenuous opposition of Arab members of the *Knesset*, establishing a minimum age of marriage, prohibiting polygamy, and enacting the principle of equal rights for women.[35] Here, again, the draftsmen of various proposed codes have before them a clear expression of the dominant social attitudes and will proceed accordingly. But these are exceptional points, likely to attract public and parliamentary attention. Other, less "sensational" issues have to be faced, on which parties, newspapers, and Parliament have remained mute, but in respect of which the technicians involved in codification will nevertheless have to adopt a position based on social value-judgments. Thus, in the work now beginning on a code of land law, the basic question must be faced whether mobility of transfers in land should be furthered in pursuit of the principle of liberty of contract, or whether it should be restricted in the interest of social stability or of some socially desirable form of land tenure. Or, in connection with the well-advanced work on a proposed code of succession, a basic problem that had to be solved was: to what extent should the principle of free testamentary disposition be allowed to interfere with stability and security of the family or *vice versa*, and at what point should the claims of the community take precedence over those of distant rela-

[32]Reshumot, Sefer Hachukkim, (5714-1954) 74. English translation in: Government Year Book 5715-1954, 249.

[33]Reshumot, Sefer Hachukkim, (5710-1950) 281. English translation in: Government Year-Book 5712-1951/1952, 189.

[34]By no means is the possibility excluded, however, that the issue of capital punishment may be revived in connection with the preparation of a new criminal code. The matter is still regarded as one which has not been settled intellectually, and actual experience may induce second thoughts among either adherents or opponents of capital punishment.

[35]Age of Marriage Law. Reshumot, Sefer Hachukkim (5710-1950) 286. English translation in: Government Year-Book 5712-1951/1952, 194. Women's Equal Rights Law. Reshumot, Sefer Hachukkim (5711-1951) 248. English translation in: Government Year-Book 5712-1951/1952, 193.

The prohibition of polygamy has been effected, in Sec. 8 of the Women's Equal Rights Law, by way of repeal of a section of the Criminal Code to the effect that proof that "the law as to marriage applicable to the husband both at the date of the former marriage and at the date of the subsequent marriage was a law other than Jewish law and allowed him to have more than one wife" constituted a good defence against the charge of the felony of bigamy. This closed the only previously existing gap in relation to polygamy, *viz.* polygamy among Moslems; in the case of Christians, polygamy being prohibited by church law, its exercise was considered a felony, and so it was among Jews, save in a special case where another clause of the Criminal Code left its control to the rabbinical tribunals.

tives in case of intestacy. And in connection with the proposed criminal code and various other enactments, there is the often debated issue whether the law should provide a minimum as well as a maximum penalty or indicate a maximum penalty only.

V

As would be expected, a series of questions had to be faced in connection with the method and techniques of codification. Arising out of the conditions described above, gradualness was chosen from the first as the prevailing method. At no time was there an over-all, general conception that was to govern all codification efforts. Depending on the more or less satisfactory state of the law in any area and on the degree of urgency or interest in having the rules governing that area systematically set out anew, steps have been taken to codify those various areas. As a result, we may speak at most of a process of partial codification, and the demarcation line between a code and a mere lengthy statute is not quite clear. It is perhaps not altogether accidental that none of the existing projects of what might be described as partial codes has been given by their draftsmen the Hebrew title corresponding to *code*, and that all of them are neutrally described as *laws*.[36] This title, and the partial character of the proposed enactments, may well signify more than a simple reluctance to undertake too thorough a revision of the existing law; they may signify an equal reluctance to discontinue the use as valid law of older sources and to abandon familiar techniques of adjudication. However that may be, the documents in various stages of preparation which are sufficiently comprehensive to merit tentative classification as codes, are the Military Justice Bill,[37] the project of a Succession Law and the project of a Law of Evidence, both mentioned before, as well as the projects of a law of domestic relations, of a penal code, of land law, and of a companies' law—all in various stages of preparation in the Ministry of Justice.

A characteristic feature of governmental activity in Israel is the unusually wide scope of activities reserved to committees and, correspondingly, the relatively narrow scope of activities entrusted to individuals. On a number of occasions, the task of legislative draftsmanship, too, was en-

[36] *Khok* is the Hebrew term used both for *law* generally and, more specifically, for *statute*. The term *khukka*, which has come to denote *constitution*, is occasionally used for *code* as well. The only enactment made in Israel that was called *khukka* in the sense of code was the "Code of Military Justice" of 1948, which was not a statute at all, but an emergency regulation made in accordance with Sec. 9 of the Law and Administration Ordinance; the validity of that document was, however, repeatedly extended by statute. The bill now pending before the Knesset, which is intended to replace the 1948 "code," is entitled *khok*, in the usual manner.

[37] Reshumot, Hatzaot Khok (5714) 154.

trusted at first to specially set up committees, designated by the Ministry of Justice but composed wholly or partly of judges, law professors, and practicing attorneys. Experience has shown that this procedure is not uniformly satisfactory, and, except in one case where the technique of preparation is laid down by statute, the actual drafting is being increasingly entrusted by the Ministry to an individual, even though the successive versions of his draft are submitted to an advisory body or are sent around to a group of individuals with requests for comments. In most cases the actual draftsman is an official of the Ministry of Justice, where two separate units, the legislative section and the legal planning section, deal respectively with fragmentary and immediate legislation and with long-range legislation of a character akin to codification. The over-all supervision of the drafting activities of the two units is in the hands of the Attorney-General who, on occasion, has personally appeared in the role of chief draftsman. As for the composition of the groups of advisors and commentators, these vary in accordance with the particular type of document. Judges are almost invariably invited to participate in these groups, and quite often government lawyers from various ministries, members of the faculty of the country's only university law school, and members of the bar, are consulted on these occasions. In a few cases, where law professors were concerned, the Ministry, instead of turning to individual professors, addressed the request for comment to the law faculty as such, leaving it to the faculty to submit the material to those of its members who are most likely to contribute relevant comments. Whether the comments come from a group acting collectively or from individuals, they are merely referred to the actual authors of the draft, the sections of the Ministry of Justice or of the other ministries concerned responsible for the preparation of the document, and, in the final analysis, to the Attorney-General. It is the latter who, in his capacity as a Legal Adviser to the Government, decides, alone or in consultation with the Minister of Justice and/or with other ministers, in what form the project is to be presented to the Cabinet prior to its formal introduction as parliamentary bill.[38]

As has been pointed out, the procedure followed in preparing codification or legislation generally, is decided upon rather informally on an administrative level. The one exception is the technique followed in connection with the publication of a revised text of laws antedating the

[38]We deal here with the preparation of government bills only. In fact, the government has monopolized legislative initiative to such an extent that private members' bills play a very minor role on the overall legislative scene in Israel.

independence of Israel.[39] The only law published hitherto under this procedure is the Interpretation Ordinance.[40]

A peculiar aspect of the country's legislative and regulatory output, which figures in the work of codification as well, is the special care given to linguistic and stylistic problems. This aspect, which presumably does not loom large in countries with a well-developed modern language and an accepted legal phraseology and style, might or might not have parallels in other countries in which the national language, not hitherto used to the full extent, has to be rapidly adapted to novel usages. In Israel, at any rate, the aspect is considered particularly important. Pride in a rich Hebrew terminology, found throughout two and a half millenia of a literature at once sacred and juristic, from the Old Testament onward, causes many participants in the drafting process to take a passionate interest in the choice of words and style. The struggle around a "national" terminology is perhaps fiercer than the struggle around "national" contents of the country's laws. Linguistic purists plead for the use of legal terms taken

[39]This procedure, twice revised by action of the *Knesset*, has been outlined in its latest form by the Knesset of June 8, 1954, as follows:

Section 16.
(a) The Minister of Justice may publish in the Reshumot a project of a new version of any law which existed in Palestine on the eve of the establishment of the State and which is still in force in the State. Such version shall contain all the modifications resulting from the establishment of the State and its authorities and all the amendments, modifications and additions which took place in that law by virtue of legislation after the establishment of the State.
(b) The Minister of Justice shall establish advisory committees of three members, of whom one—the chairman—shall be a judge appointed by the Chief Justice of the Supreme Court, one—the Legal Adviser to the Government or his representative, and one—a representative of the Bar Association or a representative of the Hebrew University.
(c) Within a period decided upon by the Minister of Justice, for each project of a new version, by notice published in the Reshumot, an advisory committee shall examine the proposed version and shall bring before the Constitutional and Legal Committee of the Knesset, in writing, its recommendations regarding the amendments required in its opinion in order to make the proposed version correspond with the original law.
(d) The Constitutional and Legal Committee of the Knesset shall decide upon the new version in the light of the recommendations of the advisory committee, and it [this version] shall be in force with its publication in the Reshumot over the signature of the Minister of Justice.
(e) Upon the entry of the new version in force as aforesaid, it shall be binding law, and no other version of the same law shall have any more effect and no argument shall be entertained to the effect that the new version deviates from the original law.
(f) Where a law has been enacted in the State and amended, the Minister of Justice may publish in the Reshumot a version of that law which shall contain all the amendments made thereto, and he may, in this connection, modify the numbers of the sections, divide sections or consolidate them. (Law to amend the Law and Administration Ordinance (No. 4), 1954. Reshumot, Sefer Hachukkim (5714) 126).

The above text has been translated and reproduced here in full, because it represents the only legislative provision existing in Israel which deals with the procedure for the revision and consolidation of laws.

[40]Reshumot, Dine Israel, Nussakh Khadash (5714) 2.

from ancient Hebrew literary monuments, even if their use in the original context was somewhat different from the meaning to be given to them now. Linguistic modernists of various schools of thought prefer to coin new and, until their social acceptance, inevitably artificial terms, though in keeping with Hebrew grammar and phonetics. Still others are not averse to literally translating or simply transliterating foreign language terms where they denote legal institutions borrowed from that language's cultural orbit. A special section in the Ministry of Justice, the section of Legal Drafting, is responsible for the style of projected legislation, a task which it approaches from the point of view of a linguist and a literary stylist no less than from that of a jurist seeking meaningful legal terminology. The same interest in style, to be chosen for linguistic and literary reasons rather than in the interest of a legal congruity, is found all along the line: among the groups of advisers and commentators to whom the draft is sent, among government lawyers, in the Attorney-General, among several cabinet members, among members of the *Knesset*, and generally in the literate sections of the public.[41] Particularly in the last two stages of legislation—consideration in the Cabinet and in the *Knesset*—where most participants are apt to be nonlawyers, changes of language are often introduced in accordance with the literary and linguistic predilections of the participants and without much thought to the effect of these changes on the eventual construction of the texts.

In one case, in connection with the project of a law of succession, a procedure was resorted to at one point in the drafting stage which was rather unusual. It should be realized that this law raises rather delicate questions: since Turkish times, the area of family relations is governed predominantly by the religious laws of the respective denominations and administered by autonomous ecclesiastical tribunals. Any change in this respect is bound therefore to arouse deep-lying sentiments in various sections of the population. In these circumstances, and in order to test sentiment in informed circles, the Ministry of Justice suggested to the University Law School to arrange a public conference in which the project was submitted to critical scrutiny. The conference was held under the joint chairmanship of the Attorney-General and the Dean of the Law School. Government lawyers, law school professors, clergymen, and attorneys took part in the proceedings. A large number of attorneys and law students attended the session, which, indeed, aroused considerable interest in the immediately interested circles. Two members of the *Knesset* also participated in the debate; characteristically, perhaps, both were women interested particularly in the status of women under the projected

[41]A. Goldberg, Mishpat, Am Velashon (Law, nation and language), Hapraklit 1954, 139–152.

law. A somewhat similar conference was arranged by the Law School, at the initiative of the Bar Association, on the subject of legislative draftsmanship. Again, the Attorney-General, government lawyers, practicing attorneys, and law school teachers, but also philologists, took part in the proceedings; and it is noteworthy that the linguistic and literary aspects of the problem focused the attention of the session no less than the impact of language on legal meaning and construction. In both cases, however, the newspapers of the country, though generally very alert to matters of social, religious, and literary import, paid but scant attention to the proceedings, a phenomenon which might be akin to the relative lack of interest of the nonlegal members of the *Knesset* when "legal" bills are under discussion.

Finally, a special feature of the Israeli codification effort is the extent to which the Israeli government draws upon the accumulated experience of foreign scholars, especially of American scholars. In 1951, before starting on the work of codification, Dr. Uri Yadin, an assistant attorney-general and head of the Section of Legal Planning, undertook a study of American methods of legislative draftsmanship and of codification, in the course of which he consulted a number of legal scholars as well as specialists engaged in federal and state legislative drafting. The contacts thus established were continued and strengthened by the formation, under the joint auspices of Harvard Law School and the Israeli Ministry of Justice, of a center for "Co-operative Research for Israel's Legal Development." In this center, a small staff working at Harvard University conducts research on topics designated by the Israeli Ministry of Justice; Israeli jurists engaged in codification projects visit the center for varying periods of time, in order to pursue their work amidst the rich resources of the Harvard Law Library; and in addition, the center acts as liaison agency with American specialists outside of Harvard, forwarding to them material for comments, arranging conferences etc. This venture is interesting as a rather unique kind of "technical assistance," mobilizing in an organized and systematic way rich foreign resources for the benefit of the legal development of a far-off country. It may well have another result: because of the intimate and continuing contact between Israeli codifiers and American lawyers, American federal and state law may come to exercise on the future law of Israel a far greater influence than it would have had otherwise.

VI

While codification is generally thought to be a phenomenon of private, criminal, and procedural law rather than one of public law in the narrow sense of the term (*i.e.*, constitutional law, administrative law, and, to the

extent to which it is regarded as municipal law susceptible of formulation and codification by a single State, international law), some attention might be paid to developments in this latter area which can be said to be analogous to codification. In this connection, one may first of all wonder whether the modern trend toward very lengthy and detailed constitutions, such as the latest constitutions of France, Italy, India, several Latin-American republics, and some states of the Union within the United States, does not represent a kind of an attempt to "codify" constitutional law, in the sense of bringing together the entire relevant material in one systematic and comprehensive document.

It is precisely in this area that codification in Israel has registered the least advance. Not only does Israel lack a comprehensive constitution, but it lacks any formal constitutional document altogether; moreover, there is no discernible present-day trend to have one enacted. At first, it was taken for granted that the writing of a formal constitution will form the main and immediate business of the first legislative assembly to issue in the new state from popular elections. Expression was given to this expectation in the nation's Declaration of Independence[42] and in the name given to that assembly by the election laws—Constituent Assembly.[43] Indeed, the provisional legislature of Israel began carrying out this intention. A special committee, the "constitutional committee", began working on a constitution, taking as the basis of discussion a fully elaborated draft of a constitutional text, prepared by Dr. Leo Cohn.[44] However, soon after the election, doubts began to appear as to the advisability of proceeding in accordance with the original plan, and in the first statute enacted by the newly elected body, it significantly changed its name to *Knesset* (=*Assembly*), dropping all reference to the constitution-writing function. For some time, the idea of a single constitutional document, enacted as such and placed in some manner "above" ordinary laws, continued active, but gradually the *Knesset* and the public lost interest in it.

The provisional solution of settling questions of a constitutional character by means of fragmentary ordinary legislation, after the British manner, appears to have become a permanent feature, and little real significance is to be attributed to the tendency of describing such laws as "basic." And even though a resolution adopted by the *Knesset* on June 13, 1950, seemingly denotes the beginning of the writing of an integrated constitution, though chapterwise,[45] in truth it denotes the abandonment of

[42] Declaration of the Establishment of the State of Israel (1 Laws of the State of Israel 3).

[43] 2 Laws of the State of Israel 24, 56, 61, 64, 80, 81, 87, 93, 94, 114, 116.

[44] 3 Peaslee, Constitutions of Nations (1950) 743.

[45] "The First Knesset directs the Constitutional and Legal Committee to prepare a project of a Constitution for the State. The Constitution shall be constructed chapter by chapter

any real effort to write one. As for the category of so-called "basic" laws, there is nothing in the text of a statute that proclaims it as "basic," and no unanimity exists therefore on which laws are included under that heading. Nor would it matter much if this were made certain, since neither in respect of enactment, nor in respect of repeal, nor in respect of degree of authority, does a "basic" law hold a position differing in any way from any other statute.[46]

The reasons ascribed in Israel for this failure to enact a formal constitution are various.[47] Some explain it by the need to wait till the planned large-scale influx of Jewish immigrants will have been accomplished, and the state will have settled more firmly its fundamental character and purposes, so that immigrants will not find their development restricted by a somewhat rigid document drawn up by others. Others recall the sad experience of European and Latin-American regimes with constitutions written in a hurry and contrast the badly working Articles of Confederation with the well-functioning Constitution of the United States adopted after an interval of eleven years. But while these arguments merely justify delay, another line of arguments is increasingly used which makes one wonder whether a formal constitution is at all intended. Thus, it is pointed out that enacting a constitution would necessitate some clear-cut decisions regarding the social-economic policies of the state and regarding the place of religion in it, matters concerning which opinion in the country is sharply divided; hence, it is argued, a constitution, instead of uniting the country, is more likely to divide it. Finally, the orderly political evolution of England is often cited in contrast to many a country in which a formal constitution was unable to ensure stability.

Presumably, each of the above arguments holds within itself a kernel of truth; but in addition to them, the course pursued may be caused by the same desire for fluidity and freedom of action which often underlines

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in such a manner that each of them shall constitute a distinct basic law. The chapters shall be brought before the Knesset as the committee shall complete its work, and all the chapters together shall comprise the State Constitution." Reshumot, 5 Divre Haknesset (1950) 1743.

The discussion of that resolution, *ibid.*, 1711–1722, sheds light on the intent of the legislature.

[46]A good example of the extent to which the "ordinary" character of even the most "basic" constitutional laws precludes the attribution of any higher degree of validity to their provisions, is afforded by Sec. 12 and 13 of the Law Concerning the Office of State President, 1951. Seeking to prevent undue interference by the *Knesset* with the President's office, these sections specify that the removal of the President from office requires a decision by the *Knesset* concurred to by ¾ of all *Knesset* members and arrived at after special procedure in committee. But these sections themselves, and the whole statute of which they form part, may be amended or repealed by any majority whatsoever, without even requiring that a given *quorum* be present.

[47]See O. Kraines, *op. cit.*, 31.

resistance to codification. Only in the constitutional realm, it is not so much the freedom of action of the judges as that of the parliamentary majority and of its leaders—the cabinet—that is being protected; for, after all, a formal constitution is primarily a brake upon the state's chief legislative and executive agencies. To avoid misunderstandings, it is well to point out that individual rights are very efficiently protected in Israel, in the absence of a formal constitution, by the judiciary against anything but statutes and that the Legislature, too, has been very careful to avoid abusing its unlimited powers and to foster a tradition of stability.[48] Nevertheless, the political climate of Israel is far removed from that of England; for all the admirable qualities traditionally ascribed to Jews, political self-restraint is not one of them; and while a formal constitution is no guarantee of stability, Israel would do well, in the opinion of this writer, were it to join that overwhelming majority of states which thought it more prudent to impose upon themselves the artificial restraint of a constitution.

A similar reluctance to systematize and codify characterizes Israeli attudes in the sphere of administrative law. Just as in England, a great body of administrative law has come into being, while the very existence of this branch of law has hardly received official recognition. A variety of administrative tribunals and administrative agencies, some of them with quasi-judicial functions, have been set up, each one with a composition and procedure and jurisdictional framework designed *ad hoc*, none of them integrated, but all of them controlled by the civil courts, more particularly by the Supreme Court armed with the triple weapons of *habeas corpus*, of broad "orders directed to public officers or public bodies in regard to the performance of their public duties and requiring them to do or refrain from doing certain acts,"[49] and of contempt of court orders. Here, adherence to the British pattern seems to constitute the principal reason for the fragmentized character of the measures taken, but, just as in England, the trend toward systematization, albeit in a rudimentary form, begins to assert itself. There are in existence, since 1934 and 1941 respectively, a Municipal Corporations Ordinance and a Local Councils Ordinance, both

[48]The only exception worth mentioning is a certain predilection for retroactive legislation.

[49]Courts Ordinance, 1940, Sec. 7.—Though nothing in the Ordinance required it to do so, the Supreme Court of Palestine has understood this broad power, in conjunction with Art. 43 of the 1922 Palestine Order-in-Council, as meaning that, in applying it, the Court will be guided by the considerations applying in England to petitions in the nature of Mandamus, Certiorari, Prohibition, Quo Warranto (until its abrogation in England in 1938), and Injunction. Accordingly, there is a tendency to relate the order given to one of these specific orders. The Supreme Court of Israel has not yet expressly departed from that position and frequently takes its stand on one of the English orders.

often amended, which, though far from being either comprehensive or perfect, offer a relatively stable framework for local self-government. Pending before the *Knesset* is the draft of a "Law of State Service" which, if enacted, would provide a solid basis for government employment relations. Another pending bill, already referred to, the "Law of Military Justice," is meant to replace an admittedly unsatisfactory document which was enacted by administrative regulation in a hurry, at the height of the War of Independence. The United States Administrative Procedure Act is attentively studied in Israel with a view to its possible adaptation. And at times, though not too frequently, one hears discussion of the merits of the continental systems of administrative law, with their high degree of systematization.

RENÉ H. MANKIEWICZ

Hague Protocol to Amend the Warsaw Convention

IMPORTANT CHANGES IN THE CONVENTION for the Unification of Certain Rules relating to International Carriage by Air, signed in Warsaw on October 12, 1929, and commonly known as the Warsaw Convention, have been introduced by a Protocol adopted by the diplomatic conference, held under the auspices of the International Civil Aviation Organization in The Hague from September 6 to September 28, 1955. The Protocol has been signed (September 28, 1955) on behalf of twenty-six states, i.e., more than half of the total number of states that participated in the meeting at The Hague.

HISTORICAL BACKGROUND

The Warsaw Convention deals primarily with the extent of the liability of international air carriers towards passengers and owners of cargo shipped by air. While establishing the principle of presumptive liability, it limits the amount of compensation due by the carrier, except in case of willful misconduct and of negligence comparable to wilful misconduct. It also regulates various technical and procedural questions relating to traffic documents and actions for damage, respectively.

Signed in the early days of aviation, it has proved, in the course of the years, to be a useful instrument in furthering international air transportation. Passenger air traffic has increased 240 fold since 1929[1], and although such traffic no longer presents the same hazards as in the late '20's[2], when the Convention was signed, its rules have never become outmoded. Quite to the contrary, with the growth of international civil aviation, the number of states that have adhered to the Convention has steadily increased. The total number of ratifications and adherences today is 45, covering 92 territories[3]; in 1934, five years after the signing of

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[1] Total passenger-kilometers flown in 1954 were 51,500 millions aganinst 212 millions in 1929. See Report of the Council to the Assembly on the activities of the Organization in 1954, ICAO DOC. 7564.

[2] The fatality rate per one hundred million passenger-miles on all airlines dropped from 45 for the period 1925–1935, to 1.75 for the years 1950–1954, and was 1.38 in 1954; the corresponding figures for one hundred million passenger-kilometers are 28.1, 1.09, and 0.86. See ICAO Digest of Air Navigation Accidents No. 6.

[3] See The Hague Conference DOC No. 6, and USAvR. 1955, pp. x–xi. Add Egypt.

the Convention, there were only 14 ratifications.[4] The inherent merits of the Convention, moreover, are exemplified by the fact that its rules have been adopted by various states for the regulation of the carrier's liability in domestic air transport.

The present weakness of the original Convention lies primarily in the relatively low limits of liability in the cases of death or bodily injury to passengers. The maximum amount of compensation for the death of a passenger is equivalent to approximately $8,300 (U.S.), while compensation between $10,000 and $100,000 (U.S.) in cases of accidental death is not uncommon in North America and in some parts of Europe.[5] There also has been criticism of the rather detailed rules of the Convention respecting the content of traffic documents, and the unlimited liability of carriers when no proper traffic document has been issued or where the particulars in such documents are insufficient.

In spite of the high degree of agreement among international lawyers on the need for revision of the Convention, the task has proved rather delicate. For its general acceptance throughout the world had made its provisions practically universal rules of liability for air carriers. Thus, it was necessary to limit revision to such amendments as were generally acceptable to states that were already parties to the Convention. Otherwise, while the amended Convention might recommend itself to some of the leading states in international air transport, objections thereto by an important number of parties to the original Convention would destroy the now almost general agreement on the rules of liability of international air carriers. Disappearance or weakening of the Warsaw Convention would indeed set international air transport back into the old chaos of conflicts of laws from which only legal practitioners specializing in this field would benefit. These considerations led the Legal Committee of ICAO at its meeting in Rio de Janeiro, 1953, to discard previous drafts of the revised Warsaw Convention[6]—the last produced by a sub-committee of the Legal Committee in Paris in 1952[7]—and to adopt the following principles:

—changes should be limited to modifications most likely to be accepted by a substantial majority of the states parties to the original Convention;

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[4] See The Hague Conference DOC No. 6.

[5] See Statement of the ICAO Air Transport Committee on Economic aspects of possible changes in the liability limits of the Warsaw Convention, ICAO DOC 7450, vol. II, p. 129 *et seq.*, and the statistics on pp. 139–145.

[6] The revision or amendment of the Convention had been studied since 1935 by CITEJA, from which the Legal Committee of ICAO took over in 1947.

[7] ICAO DOC 7450, vol. II, pp. 29 *et seq.*

—the amendments to the Convention should be incorporated into a protocol rather than in a revised text of the Convention, thereby leaving open the possibility of the original Convention continuing to be applied by states hostile to the amendments.

The draft thereafter produced by the Legal Committee of ICAO in 1953 is generally known as the Rio Draft Protocol. This draft was the basis of the discussions at The Hague Conference.[8]

Provisions of The Hague Protocol

This paper does not propose to discuss the merits of the provisions of the Protocol amending the Warsaw Convention, or to examine questions of interpretation to which they may give rise. It is limited to an analytical description of the substance and effects of the amendments, adding, when necessary, some of the reasons that led to their adoption.

(a) *New rules on limited and unlimited liability.* The Warsaw Convention limits the maximum compensation for death of a passenger to 125,000 francs Poincaré, [9] approximately $8,300 (U.S.). At the same time, however, it provides for unlimited liability (Article 25), if the damage was caused by wilful misconduct of the carrier or of any of his servants or agents acting within the scope of their employment, or "by such default on the part of the said persons as, in accordance with the law of the court seized of the case, is considered equivalent to wilful misconduct."

As already mentioned, there was a general feeling in air transport and legal circles that these limits (for damage in cases of death or bodily injury of a passenger) had become inadequate, especially in view of the practice of certain courts, notably in the United States, allowing much higher compensation for death occurring in accidents on a domestic flight. Furthermore, it was remarked that the courts of some countries have been inclined to give a very liberal interpretation of the concept of wilful misconduct or equivalent default, in order to "break" the barrier of limits of liability, by them regarded as too low. Indeed, when the question of increasing these limits of liability for death and bodily injuries was discussed in The Hague Conference, the United States delegate made it plainly understood that his Government might consider denouncing the Warsaw Convention, and thereby revert to the general principle of unlimited liability, if the present limits of the Convention were not sub-

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[8] For the text of this Protocol and for the discussions at the session of the Legal Committee held at Rio de Janeiro, see ICAO DOC 7450.

[9] This franc is defined in article 22, paragraph 4, of the Convention as "consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths."

stantially increased. The original proposal of the United States was to increase the limits to 375,000 francs Poincaré.[10]

The argument was also advanced that it would be advisable to establish relatively high limits of liability for death or bodily injury of passengers and in exchange to eliminate unlimited liability for injury caused by wilful misconduct. Under this scheme, the position of the carrier would have been very similar to that of an insurer of safe carriage. Many delegates, especially from continental countries, agreed in principle that there was need for substantial increase of the limits, but deemed it immoral and contrary to the public policy of their countries to limit the carrier's liability in case of wilful misconduct on his part or on the part of his agents acting within the scope of their employment. The delegate of France ably defined the alternatives facing the conference, as follows:

—substantial increase of the limits, and complete elimination of unlimited liability; or

—moderate but reasonable increase of the limits, at the same time narrowing down the cases of unlimited liability, this proposal entailing a redefinition of wilful misconduct and of "such default as, in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct" ("dol ou faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol"; Article 25, paragraph 1, of the Convention).

The compromise reached on the basis of the second alternative is embodied in Articles XI and XIII of The Hague Protocol, amending Articles 22 and 25 of the original Warsaw Convention. In Article XI of the Protocol (Article 22 of the Convention), the limits are increased by 100 per cent to 250,000 francs Poincaré. In Article XIII (Article 25 of the Convention), the case giving rise to unlimited liability is redefined so as to avoid use of the concepts of wilful misconduct or equivalent default. Article 25, paragraph 1, of the Warsaw Convention as amended by this provision now reads as follows:

"The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with the intent to cause damage or recklessly and with the knowledge that damage probably would result; provided that, in the case of such

[10] The question of a reasonable and economically justified and bearable increase of the limits of liability had been discussed at length by the Council of ICAO and studied thoroughly by its Air Transport Committee in the document quoted in note 4, *supra*.

act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."[11]

The conference felt that a 100 per cent increase of the limits of liability in case of death or personal injury of a passenger would efficiently counteract the tendency of the courts to look for signs of wilful misconduct or "equivalent default" in order to adjudicate higher compensation, while, at the same time, the rewording of the provision regarding unlimited liability should preclude any attempt to give this rule too liberal a construction.[12]

Concerning the rules of liability, it should also be noted that the Conference deleted paragraph 2 of Article 20 which provides special defenses for the benefit of the carrier in the case of damage to baggage and goods resulting from navigational errors. This rule borrowed originally from maritime law seemed to be out of line with modern air transport.

(b) *Liability of the servants and agents of the carrier.* The Warsaw Convention deals only with the liability of the carrier. It contains no rule limiting the liability of his servants or agents, who are therefore believed to be liable without limitation for wrongful acts committed within the scope of their employment. As conditions of employment of pilots normally provide for reimbursement by the carrier of compensation paid by them to victims of their negligent conduct, it is thus possible indirectly to make the carrier liable without limitation for damage for which the Convention stipulates limited liability. The delegate of the United States of America, supported by other delegations, proposed that this situation be remedied. Other delegates, however, believed that there was neither place nor need in the Convention to regulate the liability of the carrier's servants or agents; if their liability was to be limited, detailed rules on the subject matter should be included in the Protocol amending the Warsaw Convention or even in a new Convention dealing with servants and agents.

[11] While Article XI of the Protocol contains the complete text of Article 22 as it stands after the amendments by The Hague Conference, it should be noted that large parts of this article were not changed at The Hague. The full text has been inserted in Article XI of the Protocol for convenience only.

[12] It will be noted that the wording of the new paragraph of Article 25 comes very near to the definition of willful misconduct as adopted by the law courts in the United States. See: Ulen vs. American Airlines, Inc., District Court of Columbia, 20 April 1948, and Court of Appeals for the District of Columbia, USAvR. 1948, 162 and 1949, 338; Ritts vs. American Overseas Airlines, Inc., U.S. District Court for the Southern District of New York, 17/18 January 1949, USAvR 1949, 65; Pekelis vs. Transcontinental and Western Airlines, Inc., U.S. Court of Appeals for the Second District, 15 February 1951. USAvR. 1951, 1; Froman et al. vs. Pan American Airways, Inc., Supreme Court of New York County, 9 March 1953, USAvR. 1953, 1; Grey et al. vs. American Airlines, Inc., U.S. District Court for the Southern District of New York, 21 February 1955, USAvR. 1955, 60.

Various proposals were laid before the Conference to take care of the different views held on this question. The fundamental issue as stated by the delegate of the United Kingdom was whether

"the benefit of the limit of liability to a servant or agent should be conditional upon the limit being also available to the carrier in the circumstances of the case; *or* whether the servant or agent should be entitled to the benefit of the limit in all cases (except his own Article 25 conduct) even though the limit is not, in the circumstances of the case, available to the carrier?"

The majority preferred the first alternative which was embodied in a new Article 25 A, to the effect that, except when the servant or agent has acted negligently in the particular manner described in the new Article 25, he cannot be condemned to pay a higher compensation than the carrier. This rule is intended to prevent law suits against the pilot in order to extract indirectly a higher indemnity from the carrier.

(c) *Court costs and other expenses of the litigation.* In a number of countries, an air carrier that loses in court must bear all court costs and pay the legal fees of the claimant's lawyer, in addition to the amount of the compensation due or paid to the claimant. However, it was pointed out by the United States delegate that such is not the case in his country, where sometimes an important portion of the adjudicated indemnity is consumed by the fees of litigation, borne by the claimant.

In order to make it perfectly clear that the maximum compensation established by the new paragraph 1 of Article 22 (Article XI of the Protocol) is exclusive of such costs, a new paragraph has been added to Article 22 of the original Convention. The last sentence of that paragraph, however, provides, in accordance with generally accepted principles, that such claim for costs shall not be justified if the carrier, in due time, had made an offer for settlement in an amount equal to the sum finally adjudicated. This latter rule, indeed, will also apply in states where the ordinary rules of procedure provide that the losing party shall always bear the other party's cost of litigation and the court fees.

(d) *Traffic documents.* The original Warsaw Convention (Chapter II, Articles 3 to 8) contains most detailed provisions concerning the particulars to be inserted in passenger tickets, baggage checks, and air waybills. It also specially provides that these document must contain "a statement that the carriage is subject to the rules relating to liability established by the Convention." Furthermore, absence of the required traffic document or incorrectness or incompleteness thereof prevent the carrier from availing himself of those provisions of the Convention which exclude or limit his liability.

These rules had met with criticism from various circles. It was claimed that most of the particulars listed were superfluous. It also was considered a hardship for the carrier that the absence of a traffic document or its incorrectness or incompleteness should deprive him of all the defences relating to limited liability.

While some favored the abolition in the amended Convention of all rules dealing with traffic documents, the conference decided to maintain them at least in part, because provisions for the issue of traffic documents were considered essential in a convention, the applicability of which is linked to the existence of a contract between the parties to the carriage.[13]

However, it was found advisable to amend the existing articles to require only such particulars in traffic documents as would enable the courts to establish whether a given carriage was within the scope of the Warsaw Convention, as amended by The Hague Protocol. According to the new provisions (Articles III, IV, and VI of the Protocol), traffic documents shall only contain:

"(a) an indication of the places of departure and destination;

"(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

"(c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."[14]

Paragraphs *a*) and *b*) represent a great simplification as compared with the old rules and are sufficient to identify the carriage as one possibly falling within the scope of the Convention.

The merits of paragraph *c*), however, have to be appreciated against the discussions that led to its adoption. The requirement of the original Warsaw Convention that traffic documents shall contain "a statement that the carriage is subject to the rules relating to liability established by the Convention," has been met by the carriers by inserting in the traffic document the statement:

"Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to international Carriage, signed at Warsaw, October 12, 1929 (hereinafter called 'the Conven-

[13] See Article 1 of the Convention, and Article I of the Protocol.

[14] Paragraph c) reproduced above relates to the notice in the passenger tickets. The wording of the notice in baggage checks and air waybills is, of course, slightly different.

tion') unless such carriage is not 'international carriage' as defined by the Convention. (See Carrier's tariffs for such definition.)"

There was general agreement that this statement is inadequate because it does not indicate clearly to the passenger, or the consignor of goods, whether the carriage to which he agrees is actually governed by the Warsaw Convention. On the other hand, if there were to be a provision stipulating that the document should show that the carriage for which it was issued was in fact within the scope of the Convention, then the traffic clerks of the carriers who issue the tickets, baggage checks, or air waybills would be under an obligation to ascertain the applicability of the Convention to the specific carriage; this, it was felt, was too difficult a question to be answered by a subordinate agent of a carrier in charge of making out traffic documents.

There was general consent, on account of the general rule of limited liability and in view of the possibility that the established limits may still be insufficient, that passengers and consignors of goods should be put on notice that the carriage might be governed by the Warsaw Convention's rules on limitation of liability, in order that they may take out additional insurance, if necessary or desired. On the joint proposal of the United States of America and IATA, it was therefore decided that traffic documents should contain the notice prescribed in the above quoted paragraph *c*).[15]

Various delegates immediately pointed out that such warning in the traffic document was of use for the passenger or the consignor of goods only where it was brought to his attention at the time when he could still take out additional insurance either for death or injuries or for damages to goods, as the case may be. In other words, the interested party must have, and be able to read, the warning before the start of the actual carriage. It was therefore decided that the limitation of liability provided by the Convention would not apply if the traffic document bearing the said notice was not delivered at the time when the passenger embarked on the aircraft or when the goods were loaded on board; see new Article 3, paragraph 2, new Article 4, paragraph 4, and new Article 9 of the Convention, i.e., Articles III, IV, and VII of the Protocol.

Attention should be drawn to the fact that no provision whatsoever has been made in the Convention, as amended, to ensure that the passenger ticket is actually handed over to the passenger and therefore can be read and inspected by him. The rule of the original Convention (Article 3) that "the carrier must deliver a passenger ticket," has been

[15] See preceding note.

restated to read, "a ticket shall be delivered." There is, however, no special mention of delivery to the passenger personally.

The question whether the Convention requires actual delivery of the ticket to the passenger concerned was discussed by various New York courts in *Froman et al. v. Pan American Airways Corp.*[16] This was a case where the claimant had travelled with a group of fellow passengers, tickets for all the passengers having been delivered to the group leader. The Supreme Court of New York County decided that the leader of the group "had implied authority to receive a ticket on behalf of the plaintiff and that the delivery of the ticket to him is binding upon the said plaintiff." The Court of Appeals contented itself with the following statement:

"It can hardly be disputed that when a ticket bearing the appellant's name and . . . reference to the Warsaw Convention limitation was laid in front of the appellant on the table in the airport she, by thereafter boarding the plane as a traveller on that ticket, impliedly, if not expressly, ratified and adopted what had been done (by the leader of the group) in taking out that ticket in her name."[17]

The story of this case shows that it is open to doubt whether in all cases the passenger will have actual knowledge of the contents of the ticket on which he is travelling. Such is the case particularly when groups are travelling on chartered flights, a feature which is more and more common in international transport. Consequently, it might have been wise to take advantage of the arguments in the *Froman* case to spell out in the Convention, as amended by The Hague Protocol, that the passenger must *personally* take delivery of the ticket prior to embarkation. However, this having not been done, there is sufficient support in the discussions at the conference leading to the phrasing of the new Articles 3, 4, and 9 to construe these provisions as meaning that the ticket bearing the notice must have been in the physical possession of the passenger prior to embarkation. Indeed, absence of such notice, informing the passenger in due time on the limitations of liability, will preclude the carrier under the new articles from invoking the limits of liability.

In this connection, attention is also drawn to the changes made by The Hague Protocol in the wording of the original rule which prevented the carrier, in case of nonissuance of a proper traffic document, from invoking the provisions of the Convention "which exclude or limit his

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[16] USAvR. 1948, 47 and 1949, 168.

[17] See however dissent by Conway, J., in which Lewis, J. concurred.

liability."[18] It was argued that there is no reason to impose unlimited liability when no proper traffic document has been issued or when one of the various particulars listed in Articles 3, 4, and 9 of the original Convention is missing. The argument found some support in the fact that these Articles listed up to 17 particulars, which made it unreasonable to attach a sanction to the failure to issue proper and complete traffic documents.

Opponents of these proposals claimed that it would be illogical to compel the carrier to deliver traffic documents containing certain specific features and not to provide sanctions for failure to do so. However, they admitted that the sanction imposed by the Warsaw Convention is too drastic; it prevents the carrier not only from invoking provisions which limit his liability but also from pleading defenses which would exclude all liability. The philosophy of the Convention was that, as limited liability is not a general principle of the law of contracts and torts in most countries, a carrier could not avail himself of the limitations on liability unless he had given notice to his customers of the peculiar features of the Convention and thus made it possible for them to take out insurance to cover additional damage. On the other hand, it was agreed that there was no necessary relation between the absence of proper traffic documents and the defences which the carrier can invoke in order to exclude all liability.

Having rejected an Australian proposal to limit the sanction for non-delivery of proper traffic documents to an increase of the limits of liability by 50%, the conference decided to provide unlimited liability in cases where no traffic document was issued or such documents did not contain the notice provided by paragraph *c*) of Articles III, IV, and VI respectively, but the relevant rules of the original Convention were changed so as to permit the carrier to invoke defences excluding liability, even in such cases.

The latter amendment called for a corresponding amendment of Article 34, which exempts from the scope of the Convention, and thereby establishes unlimited liability for "carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business." Such

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[18] Article 3, paragraph 2, second sentence of the original Convention reads as follows:

"Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability."

Articles 4 and 9 of the Convention contain similar provisions relating to baggage checks and air waybills.

carriage is often of an emergency nature, and the conference found that it would not be reasonable to attach any sanction to the failure of the carrier to issue proper traffic documents in cases of this type. Therefore, omitting trial flights mentioned in the same article, the conference redrafted the provision in question, so as to exempt carriage outside the normal scope of an airline business from the application of the articles relating to traffic documents.

(e) *Negotiability of the air waybill.* The question whether and under what conditions the air waybill should be made negotiable had occupied the ICAO Legal Committee for a long time. Some business circles felt that the speed of modern aircraft made negotiability of the air waybill meaningless. Others, however, thought that it might prove useful. Some delegates to the conference were of the opinion that it would be necessary to elaborate detailed rules on negotiability, if the Protocol were specifically to provide for a negotiable air waybill. The conference finally agreed to approve the opinion held for some time by eminent air lawyers that the Warsaw Convention did not exclude the delivery of a negotiable air waybill, leaving it to national legislation to provide the necessary additional rules. Consequently, a new paragraph 3 was added to Article 15 of the Convention stating that nothing in the Convention prevents the issue of a negotiable air waybill. In order that such "interpretation" of the Warsaw Convention may be adopted by the law courts even before the coming into force of the Protocol, and to record the feeling of the conference in adopting the said paragraph 3, a resolution inserted into the Final Act of the Conference states that this provision has been adopted "only for the purpose of clarification."

(f) *Miscellaneous amendments.* Various amendments to the original Convention were adopted in order to eliminate obscurities or to bring the text into conformity with present political and air transport conditions. Thus, paragraphs 2 and 3 of Article 1 relating to the scope of the Convention have been redrafted, and a new article 40 A inserted, defining the words "High Contracting Parties" and "territory." Amendments of a similar nature are to be found in paragraph 2 of Article 2, paragraph 3 of Article 6, paragraph 2 of Article 10, paragraph 2 of Article 23.

The amendment of Article 26, paragraph 2, seeks to prolong the period for notice of damage to baggage or goods.

(g) *Coexistence of the Protocol and the original Convention.* A first difficulty from the coexistence of The Hague Protocol and the Warsaw Convention may arise from the fact that the former sometimes employs a different terminology. For example, the Protocol speaks of cargo while the English translation of the Warsaw Convention (drafted only in

French) uses the word "goods." Other discrepancies are found in the English texts of the Convention prepared by the Government of the United States of America and the United Kingdom, respectively; the same is true as regards the various official translations into Spanish. In order to avoid new difficulties in interpretation that might arise from discrepancies in the terminology of the Convention and the amending Protocol, the latter provides (Article XIX) that "as between Parties to this Protocol, the Convention and the Protocol shall be read together as one single instrument and shall be known as the *Warsaw Convention, as amended at The Hague, 1955*.

On the other hand, it must be remembered that the only authentic text of the original Convention is drafted in French, while The Hague Protocol was drafted in English, French, and Spanish. In order to prevent difficulties and contradictory interpretations which may arise from the use of such a diversity of languages, the Protocol "has been drafted in three authentic texts in the English, French, and Spanish languages" and provides that "in case of inconsistency, the text in the French language, in which language the Convention was drawn up, shall prevail."

Another and more serious difficulty will arise from the coexistence of the Convention and the Protocol in case, two states (A and B) being Parties to the Convention, one of them (A) ratifies the Protocol while the other (B) abstains. In such case, could state B complain to state A on the ground that the original Convention is not applied to cases involving its (B's) nationals? Furthermore, as the Convention applies to carriage between the territories of two contracting states, would a carriage between A and B still be governed by the Convention, or would the law applicable to damage caused during such voyage be determined by the ordinary rules of conflict of laws?[19]

A first safeguard against such eventualities is provided by Article XXII of the Protocol, which requires ratification by 30 states for the coming into force of the Protocol, the unexpressed hope being that adherence by 30 out of 44 states would incline other parties to the Convention to ratify the Protocol.

However, this strategical planning does not remove the fundamental legal issue of the co-ordination between the Convention and the Protocol amending it. That has been taken care of by providing in Article XVIII of the Protocol that the amended Convention shall apply only to carriage between states that have ratified the Protocol, or to return carriage

[19] A special subcommittee of the Legal Committee has studied, and reported on these and other related questions; see The Hague Conference DOC No. 28.

from and to such a state with an agreed stopping place in another state. It follows therefrom that the original Convention continues to be applicable to carriage between the territories of parties to the Convention as long as only one of them has become a party to The Hague Protocol. This rule serves to maintain the large uniformity of the law of international air carriage which has been achieved by the 1929 Convention. It will be superseded by new rules only as among states that prefer them to the old.

WARSAW CONVENTION

ORIGINAL TEXT[1]	AS AMENDED BY THE HAGUE PROTOCOL
Art. 1. (1) . . .	*Art. 1.* 1. . . .
(2) For the purpose of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.	2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.
(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereighty, suzerainty, mandate, or authority of the same High Contracting Party.	3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contact or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

[1] As translated in 49 U.S. Stat. 3014.

Art. 2. (1) . . .

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

Art. 3. (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Art. 4. (1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

Art. 2. 1. . . .

2. This Convention shall not apply to carriage of mail and postal packages.

Art. 3. 1. In respect of the carriage of passengers a ticket shall be delivered containing:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1 *c*) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

Art. 4. 1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one

(*b*) The place of departure and of destination;
(*c*) The name and address of the carrier or carriers;
(*d*) The number of the passenger ticket;
(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;
(*f*) The number and weight of the packages;
(*g*) The amount of the value declared in accordance with article 22(2);
(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Art. 6. (1) . . .

(2) . . .

(3) The carrier shall sign on acceptance of the goods.

Art. 8. The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;
(*b*) the place of departure and of destination;
(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;
(*d*) The name and address of the consignor;
(*e*) The name and address of the first carrier;

or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
c) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.

2. The baggage check shall constitute *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1 *c*)) does not include the notice required by paragraph 1 *c*) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2.

Art. 6. 1. . . .

2. . . .

3. The carrier shall sign prior to the loading of the cargo on board the aircraft.

Art. 8. The air waybill shall contain:

a) an indication of the places of departure and destination;
b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
c) a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the

(*f*) The name and address of the consignee, if the case so requires;
(*g*) The nature of the goods;
(*h*) The number of packages, the method of packing and the particular marks or numbers upon them;
(*i*) The weight, the quantity, the volume, or dimensions of the goods;
(*j*) The apparent condition of the goods and of the packing;
(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;
(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;
(*m*) The amount of the value declared in accordance with article 22(2);
(*n*) The number of parts of the air waybill;
(*o*) The documents handed to the carrier to accompany the air waybill;
(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;
(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

Art. 9. If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*) inclusive and (*q*), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

Art. 10. (1) . . .

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Art. 15. (1) . . .
(2) . . .

liability of carriers in respect of loss of or damage to cargo.

Art. 9. If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph *c*), the carrier shall not be entitled to avail himself of the provisions of Artcle 22, paragraph 2.

Art. 10. 1. . . .

2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor.

Art. 15. 1. . . .
2. . . .
3. Nothing in this Convention prevents the issue of a negotiable air waybill.

Art. 20. (1) . . .

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Art. 22. (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

Art. 20. 1. . . .

2. Deleted.

Art. 22. 1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

2. *a*) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger.

4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.

Art. 23. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Art. 23. 1. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

Art. 25. (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

Art. 25. The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Art. 26. (1) . . .

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

Art. 34. This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

that he was acting within the scope of his employment.

Art. 25 A. 1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Art. 26. 1. . . .

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.

Art. 34. The provisions of Articles 3 to 9 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Art. 40 A. 1. In Article 37, paragraph 2 and Article 40, paragraph 1, the expression *High Contracting Party* shall mean *State*. In all other cases, the expression *High Contracting Party* shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.

(2) For the purposes of the Convention the word *territory* means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible.

THE HAGUE PROTOCOL

Scope of Application of the Convention as Amended

Article XVIII. The Convention as amended by this Protocol shall apply to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two parties to this Protocol or within the territory of a single party to this Protocol with an agreed stopping place within the territory of another State.

Final Clauses

Article XIX. As between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955.*

. . . . . .

Article XXIV. 3. As between the Parties to this Protocol, denunciation by any of them of the Convention in accordance with Article 39 thereof shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

Article XXV. 1. This Protocol shall apply to all territories for the foreign relations of which a State Party to this Protocol is responsible, with the exception of territories in respect of which a declaration has been made in accordance with paragraph 2 of this Article.

2. Any State may, at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Protocol does not apply to any one or more of the territories for the foreign relations of which such State is responsible.

3. Any State may subsequently, by notification to the Government of the People's Republic of Poland, extend the application of this Protocol to any or all of the territories regarding which it has made a declaration in accordance with paragraph 2 of this Article. The notification shall take effect on the ninetieth day after its receipt by that Government.

4. Any State Party to this Protocol may denounce it, in accordance with the provisions of Article XXIV, paragraph 1, separately for any or all of the territories for the foreign relations of which such State is responsible.

Comments

AMERICAN INFLUENCE ON CONSTITUTIONAL INTERPRETATION IN INDIA

The Constituent Assembly of India framing the new Constitution of 1950 relied on a number of patterns; English constitutional law was the guiding factor for the parliamentary system of government, American constitutional law for conceiving a bill of rights, and Canadian and Australian constitutional law for reconciling federalism with the system of government adopted. Converging influences brought other aspects of legal thought in their train, and new problems arose which will, sooner or later, call for judicial decision. While judges are still in a state of experimenting, the task of the student of comparative law is to sort out the pros and cons of alternative solutions and to help in the clarification of conflicting views. The adoption of suitable methods of interpretation of the Constitution is one of the problems which deserve attention. In the case of *Gopalan v. the State of Madras*[1] the Supreme Court of India rejected the idea of interpretation of the provisions of the Constitution "in the spirit of the Constitution." The judges thought that an extensive constitutional charter comprising 395 articles and nine schedules lends itself to the application of strict and not liberal methods of interpretation.[2] However in the case of the *State of Madras v. C. G. Menon*,[3] the Supreme Court of India considered some of the provisions of the Fugitive Offenders Act 1881 as repugnant to the conception of the Sovereign Democratic Republic of India laid down in the Preamble of the Constitution. In other words the problem of interpretation "in the spirit of the Constitution" remained open to experiment. Another problem of more fundamental importance is that of ascertaining the intentions of the constitution-makers in case of ambiguity in the provisions of the Constitution. Conflicting decisions relating to this problem call for detailed consideration.

Indian judges have been used to relying on English rules of statutory interpretation according to which the intention of the lawmakers has to be ascertained from the words of the enactment and not from the course which a bill followed in the legislature.[4] If this rule is strictly applied to problems of interpretation of the Constitution, preparatory work originating from the proceedings of the Constituent Assembly would be wholly irrelevant for the purpose of ascertaining the intentions of the constitution-makers except perhaps in cases of latent ambiguity in the provisions of the Constitution.[5] This

[1] 1950 SCJ (Supreme Court Journal) 174.

[2] A different view was expressed by Sir Maurice Gwyer, late Chief Justice of India, who advocated a liberal interpretation of the Government of India Act 1935 (1939 FCR, I, 18).

[3] AIR (All India Reporter) 1954 SC 517.

[4] R. Burrows: Interpretation of Documents 1943, p. 14.

[5] Durga Das Basu: Commentary on the Indian Constitution, p. 13.

is neither the position in American law, in French law, nor in the laws of many other countries with written constitutions,[6] nor is it a rule adopted by the International Court which admits "*travaux préparatoires*" for the interpretation of treaties.[7] In the view of American constitutional lawyers, the debates which surrounded the drafting and adoption of the provisions of the United States Constitution and its amendments are admissible in aid of interpretation as indicative of their intended purpose.[8] Moreover, in the field of ordinary statutory interpretation American courts are not shut off from any discussion of sources available to the Legislature.[9] Where the meaning of a statute is obscure, announcements of committees of the Legislature may be admitted in evidence as possessing considerable value of an explanatory nature regarding legislative intent. Such announcements as well as debates of legislators may shed light on ambiguities arising in enacted law.[10]

Thus the Indian Supreme Court has been confronted with at least two different patterns in the field of constitutional interpretation, and the discussion of one or two essential decisions may show what were the solutions adopted by the judges. In *Gopalan v. State of Madras*[11] the question arose whether the provisions of the Preventive Detention Act 1950 were consistent with articles 21 and 22 of the Constitution.[12] Article 21 states that "no person shall be deprived of his life or personal liberty except according to procedure established by law". Article 22 provides for preventive detention for reasons connected with defense, foreign affairs, security, maintenance of public order or of supplies and services essential to the community.[13] It also provides for appropriate procedural safeguards in favor of persons detained, such as the right to receive the grounds of detention, to make a representation, to obtain the opinion of a special advisory board, and it imposes a duty on Parliament to prescribe a maximum period of detention. These provisions were included in the Constitution to safeguard security and order which had been threatened by unscrupulous elements in the period of formation of Independent India and afterwards.[14]

For the constitutional lawyer, it is important to remember that the text of article 21 read originally as follows: "No person shall be deprived of life or liberty except according to due process of law." The Constituent Assembly

[6] Sir John Salmond: Jurisprudence (Ed. by J. L. Parker), 1937, p. 95.

[7] H. Lauterpacht: Some Observations on Preparatory Work in the Interpretation of Treaties (48 Harvard Law Review, pp. 549–591).

[8] R. J. Fisher: Separation of Church and State (Boston Univ. Law Review, 1953 p. 73); Cooley's Constitutional Law, 1931, p. 195.

[9] Crawford: Statutory Construction pp. 381, 419.

[10] Crawford op. cit. pp. 377–8, 414.

[11] 1950 SCJ 174.

[12] The Act authorises the Detaining Authority to arrest persons on suspicion of activity prejudicial to security and public order; the subjective satisfaction of the authority as to the sufficiency of the grounds of detention is not justiciable.

[13] Schedule VII of the Constitution (I, 9 and III, 3).

[14] C. H. Alexandrowicz-Alexander: Common Law Prerogative Writs in India (Indian Year Book of International Affairs 1953).

later changed its mind and replaced the "due process" clause by a clause borrowed from art. XXXI of the new Japanese Constitution: "Procedure established by law." It also qualified the word "liberty" by adding "personal," presumably to make it clear that the fundamental rights of freedom of movement in article 19 (1,d) and of personal liberty in article 21 should be separately treated. From these changes adopted by the Constituent Assembly follow important consequences. The omission of the "due process" clause from article 21 made it impossible for the judges to go into the reasonableness of grounds of preventive detention applied by the detaining authority. Moreover, in consequence of a separate treatment of personal liberty and freedom of movement the judges, while allowed to go into the reasonableness of restrictions on freedom of movement (article 19, 5) cannot extend judicial review from article 19 to article 21.

A. K. Gopalan was detained under the Preventive Detention Act 1950 and brought a habeas corpus petition arguing that the act was unconstitutional and that his fundamental right of personal liberty had been violated.[15] The Supreme Court came to the conclusion that (except one minor provision) the act was constitutional and the petitioner's detention lawful. The judges considered the words of article 21 as perfectly clear and unambiguous. Still to justify their decision they referred to the debates of the Constituent Assembly and particularly to the report of the drafting committee of the Assembly which testifies to the above-mentioned changes effected by the Assembly in the text of article 21.[16]

Kania C. J. stated that "resort may be had to these sources with great caution and only when latent ambiguities are to be resolved." This obviously reflects English law. Later he said that the words of article 21 are not ambiguous, and thus we may wonder why reference to the report and the debates were allowed. The learned judge was right in assuming that there was no ambiguity, as the words of article 21 do not contain the expression "due process of law" but still he seems not to have resisted the temptation to make sure, with the help of the report, that all shadow of "due process of law" has been definitely eliminated from article 21.[17]

Fazl Ali J., the leading dissenting judge, was concerned with the expression "personal" liberty in article 21 and expressed the conviction that its inclusion in article 21 does not stand in the way of a joint treatment of articles 21 and 19, 1,d (freedom of movement). He declared further that it is "open to us to analyse the statement" in the report of the committee and though he considered it not to be "an overriding consideration," he drew his own conclusions from its analysis.[18]

Patanjali Sastri J. stated that "the drafting committee of the Constituent Assembly to whose reports reference was freely made, . . . recommended that

[15] 1950 SCJ 174.
[16] Constituent Assembly Debates, III 426 and VII, 1001.
[17] 1950 SCJ 185–6.
[18] 1950 SCJ 206–7.

the word liberty should be qualified by the insertion of the word 'personal' before it, for otherwise it might be construed very widely so as to include even . . . freedom of movement." Far from disallowing these references, he quoted the above recommendation in his judgment and declared that "the acceptance of this suggestion shows" that articles. 19, 1d and 21 deal with different matters.[19]

Mahajan J. (dissenting) referred several times to the intentions of the constitution-makers but did not discuss rules of ascertaining these intentions even when he expressed the view that an anomalous result could not have been "in the contemplation of the framers of the Constitution."[20] Das J., refraining from the expression of any opinion in the matter said: "I do not . . . desire to base my judgment on the drafting committee's report and I express no opinion as to its admissiblity," thus leaving the door open for the working out of appropriate rules of interpretation.[21]

Finally Mukherjee J., referring to the insertion of the word "personal" in article 21, as well as to the omission of the words "due process of law" stated that "the report of the drafting committee . . . has been relied upon by both parties and there are decided authorities in which a higher value has been attached to such reports than the debates on the floor of the House." He drew our attention to the case of *Caminetti v. United States*[22] in which "it is said that reports to Congress accompanying the introduction of proposed law may aid the Courts in reaching the true meaning of the legislation in case of doubtful interpretation." He further stated emphatically that "in the Indian Constitution the word 'due' has been deliberately omitted and this shows clearly that the constitution-makers of India had no *intention* of introducing the American doctrine."[23]

Thus the majority of the judges have not disallowed reference to the debates except to statements of members of the Assembly made in their individual capacity. Such reference was obviously admitted to show group intention, i.e., the collective will of the legislative body in whatever way expressed. With the exceptions of Mahajan and Das JJ., all the judges have also analysed or considered the report of the drafting committee, though in varying degree, to prove that the "due process of law" clause has been deliberately omitted from article 21 and the expression "personal" liberty included in it. It is obvious that there was no latent ambiguity in the words of article 21, and thus a definite though cautious deviation from English rules of statutory interpretation seems to have been initiated. Though according to these rules no reference to the report was admissible in the absence of ambiguity, the majority of judges preferred to do so and to gain an additional argument in support of their decisions. It is also obvious, particularly from the statements of Mukherjee J., at

[19] 1950 SCJ 232.
[20] 1950 SCJ 257.
[21] 1950 SCJ 290.
[22] 242 US 470.
[23] 1950 SCJ 270–1, 277.

present Chief Justice of India, that the above deviation has taken place under the influence of rules of statutory and constitutional interpretation as adopted in the United States. However, while such a tendency made itself felt in *Gopalan's* case, the Supreme Court adopted a different attitude in subsequent cases; one of them, which is of fundamental importance for the interpretation of article 31 of the Constitution, is the case of the *State of West Bengal v. Mrs. B. Bannerjee.*[24]

Article 31 relates to eminent domain and states in clause 2 that a law under which property is compulsorily acquired for a public purpose should provide for compensation and either fix "the amount of the compensation" or specify "the principles on which and the manner in which the compensation is to be determined and given." The plaintiff, whose property had been acquired under article 31 (2) on the basis of an act of the West Bengal Legislature, complained that the principles determining compensation did not provide for *adequate* compensation and that the act was therefore unconstitutional.

The Attorney General appearing for the State argued before the Supreme Court that the term compensation "was not used in the constitution in any rigid sense importing equivalence in value but had reference to what the Legislature might think was a proper indemnity for the loss sustained by the owner."[25] The Court disagreed with the above interpretation of the term compensation and held that it *must mean* full indemnification of the expropriated owner. The judges did not concern themselves with the absence of the words "just" or "adequate" compensation in article 31 (2) which had been *deliberately* omitted by the Constituent Assembly from the article. It was Prime Minister Nehru who introduced the article in the Assembly and expressed the opinion of its overwhelming majority when he declared that the term compensation by itself could not mean "just" or "adequate" compensation. Mr. Nehru's and the Congress Party's anxiety about the success of the agrarian reform as well as the entirety of measures promoting social and economic reform in India found its forceful expression in his belief that Congress is pledged to see these reforms through otherwise they would come *not by law.*[26] Public opinion in India is overwhelmingly in favor of these reforms, and it is obvious that the state in the absence of adequate resources is unable to pay full and adequate compensation in all cases. For the constitutional lawyer, the question arises whether the term compensation as such may implicitly mean just or adequate compensation and whether the courts are entitled to go into its adequacy. The text of article 31 (2) has been *mutatis mutandis* borrowed from Section 299 (2) of the Government of India Act 1935, and leading commentators had earlier expressed the view that the term compensation by itself cannot mean full compensation in India.[27] If on the other hand the judges had serious

[24] AIR 1954 SC 170.

[25] AIR 1954 SC 170.

[26] Constituent Assembly Debates, IX, 1191.

[27] See for instance: N. Rajagopala Aiyangar: The Government of India Act 1935, p. 316. M. Ramaswamy: Fundamental Rights, 1946, p. 229.

doubts about the meaning of the word compensation, particularly whether it could mean implicitly just and adequate compensation, there was room for referring to the Constituent Assembly debates to ascertain the definite intentions of the constitution-makers. As the judges have not done so and have enquired into the adequacy of compensation, the further question arises how can matters of interpretation adopted in this case be reconciled with different methods of interpretation adopted in *Gopalan's* case. It is somehow difficult to understand why some preparatory work of the Assembly has been used to clarify the meaning of article 21 and to dismiss a habeas corpus petition and why it has not been used for purposes of interpretation of article 31 (2). If in the view of the judges the term compensation was clear to the extent of not calling for resort to the equally clear but different intentions of the Constituent Assembly, why have the majority of judges in *Gopalan's* case referred to the report of the drafting committee to show that what was not to be found in article 21 (due process) was previously omitted, and what was to be found in the text (personal liberty) was previously added. The texts of articles 21 and 31 (2) could have been considered equally clear or equally ambiguous. If the first was the case, there was no need to refer to preparatory work of the Assembly in either of the two decisions. If on the other hand the latter was the case, reference to it was equally admissible in both decisions to consider the omission of "due process of law" in article 21 and of "just or adequate compensation" in article 31 (2). Either one or the other solution should be adopted but one of them must be adopted for both and indeed for all types of cases to secure uniformity in principles of interpretation of the Constitution.

No doubt in Mrs. B. Bannerjee's case the judges followed English law according to which the course which the bill followed in the legislature cannot be admitted to interfere with the construction of the act. The intention of the lawmakers, according to English law, is ascertained from the words of the enactment. This view has been strongly expressed by Patanjali Sastri C.J. in the *State of Travancore-Cochin v. the Bombay Co., Ltd., Alleppey*.[28] However, the learned judge remarked rightly that the rule of exclusion of the Constituent Assembly or parliamentary debates "has not always been adhered to in America." This is indeed the case, and the question arises whether Indian constitutional law is going to follow exclusively the English law of statutory interpretation. We have seen that evidence of "*travaux préparatoires*" is admitted in French law, in many other countries with written constitutions, and last but not least in the International Court. The analogy between Indian and English constitutional law is far from complete. India has a written constitution while Great Britain relies mainly on unwritten law and conventions. Whereas constitutional amendment in Great Britain may take place by a simple majority of votes in Parliament, such amendment in India is in most cases under article 368 of the Constitution a cumbersome procedure requiring a qualified majority in both Houses and in many cases the ratification of the amendment by at least

[28] 1952 SCJ 527 at 532.

half of the member states of the federation ("A" and "B"). It is obvious that if the Supreme Court is going to ignore in vital matters the intentions of the constitution-makers who are at present the ruling party of India, frequent tensions must develop between them and the judiciary which are likely to result in amendment of the Constitution. This is the case with article 31, which had to be amended in consequence of the decision in the *State of West Bengal v. Mrs. B. Bannerjee.*[29]

It may be interesting to note that even the attitude of English practice to problems of interpretation of statutes and documents is not as rigid as many lawyers wish it to be. Circumstantial evidence of intention of a signatory to a document is permissible in the case of any ambiguity and not limited to equivocation (latent ambiguity).[30] Moreover, in a number of cases involving constitutional issues, British courts have admitted preparatory work in aid of evidence. In *British Coal Corporation v. The King*,[31] the Judicial Committee of the Privy Council considering a Canadian appeal held that the resolutions and declarations of the Imperial Conferences of 1926–1930 are sources of highest importance from which to ascertain the *law of the Constitution* and made use of them for the construction of the Statute of Westminster. Many English judges of distinction have departed from traditional rules of statutory interpretation, among them Hangham C. J., who is reported to have said that he knew better than counsel the meaning of the Statute of Westminster, as he was instrumental in drawing it up.[32] In *Henrietta Muir v. the Attorney General for Canada*, the Privy Council referred to proceedings of the committee of the House of Commons, to ascertain the meaning of the term "person" in S. 24 of the Canadian Constitution (British North America Act 1867) and held that it covered men and women.[33] Other cases could be quoted to show that British judges have tended to admit some deviations from the traditional law of statutory interpretation, though they must be considered an exception to the rule.

In a recent analysis of problems of constitutional interpretation in the United States, the view has been expressed that the intentions of the Federal Convention of 1787 which framed the American Constitution should no longer be a principal rule of guidance for public authorities.[34] The following reasons are given in support of this proposition: (1) The constitution framed by the Convention has been modified by the "later framers," particularly by judicial interpretation so as to give the intentions of the Convention or the authors of the amendments much less significance today; (2) in sofar as the intentions of the original framers of the Constitution are still important, the recorded evidence as to those intentions has now been so fully exploited for over 160

[29] See: Constitution (Fourth Amendment) Act 1955 according to which the adequacy of compensation has been made non-justiciable (art. 31, 2).

[30] Phipson's Law of Evidence, 1943, p. 280.

[31] 1935 AC 500 at 507.

[32] H. Lauterpacht op. cit. pp. 549–591.

[33] 1930 AC 124, 143.

[34] W. Anderson: The Intention of the Framers: A Note on Constitutional Interpretation (49 American Political Science Review, June 1955).

years that very little new and reliable interpretation is forthcoming. The author of the above analysis states further: "Of course there will be re-interpretations from time to time, but in so far as the re-interpretators keep close to what the original framers themselves said and did, and use scientifically testable methods of historical and legal analysis, no great new contributions to an understanding of the intentions of the original framers can be expected."

None of these arguments which could reduce the importance of the intentions of the original framers of the Constitution (if admitted in aid of evidence), would apply to India. Whereas the American Constitution was framed at the end of the XVIII century, the Constitution of India came into force only recently in 1950. Those who framed the Constitution of India enjoy at the same time undisputed national leadership and the need for adjusting the Constitution, in accordance with or in spite of the intentions of the founders, to new conditions of life is still nonexistent in India. Quite to the contrary, it is the Constitution which is intended to bring about social and economic reform. Moreover, whereas recorded evidence as to the intentions of the constitution-makers in the United States may by now have been fully exploited, the task of Indian constitutional lawyers, particularly in the academic field, is to explore thoroughly the background of the Constitution in full awareness of the fact that "the nearer man can get to knowing what was intended, the better. Indeed the search for intentions is justified as a search for the meanings that the framers had in mind for the words they used but it is a search which must be undertaken in humility and with an awareness of its great difficulties."[35] Such a view would not seem strange to Indian judges, and this was indeed the attitude adopted by them in *Gopalan's* case though it seemed later to have been abandoned.

In view of somewhat inconsistent methods of interpretation of the Constitution adopted by the Supreme Court of India, particularly in ascertaining the intentions of the constitution-makers, the question of allowing these methods to evolve towards uniformity gains importance. Uniformity is necessary to make judicial interpretation predictable, and further it is essential for Government and Parliament to know what is their position in the field of vital social and economic reforms as planned by the Constituent Assembly. Whatever methods of interpretation the judges care to adopt, whether English rules of statutory interpretation or the American pattern which is more suitable in present circumstances, one law of interpretation should finally prevail as applicable to all types of cases.

CHARLES HENRY ALEXANDROWICZ-ALEXANDER*

[35] W. Anderson *ut supra*.

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A JAPANESE *CAUSE CÉLÈBRE*: THE FUKUOKA PATRICIDE CASE

1. The new Japanese Constitution, written under the aegis of the Occupation, states in Article 81: "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."[1]

The Supreme Court consists of fifteen judges. Constitutional issues are decided by the entire court, sitting as the Grand Bench.[2] There have been a number of constitutional cases, but up to date no Diet law has been declared unconstitutional. In the case under discussion the constitutionality of a provision of one of Japan's six basic codes—the Criminal Code—was questioned. Considering the importance of these codes, the issue was bound to arouse the interest of the legal world.[3]

Expressed disagreement has often been considered bad taste in Japan. The vigor with which the new legal provisions for the writing of dissenting opinions are being used is thus somewhat surprising.[4] In the present case, four opinions were written: one representing the majority view, two dissenting opinions and one opinion which disagreed with the majority only on a procedural point.[5] The dissenters were judges of great prominence. Both had been considered for the post of Chief Justice. Justice Mano had come to the court from the bar; the late Justice Hozumi had a distinguished career as law professor, was a former member of the House of Peers and a former Grand Chamberlain to the Crown Prince. By coincidence, both judges happened to be in the United States together with Chief Justice Tanaka when the Supreme Court decision was announced.

2. The significance of the Fukuoka Patricide Case can be understood only when the case is viewed in its sociological setting. A prominent feature of this setting is the crumbling of the traditional value pattern under the impact of social change.

A highly articulated element of the traditional pattern is the so-called family system. According to it the family, not the individual, is the basic social unit. The traditional Japanese family is not the conjugal family of the West, but

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[1] Judicial review was unknown to the Japanese Constitution of 1889. In spite of the somewhat ambiguous language of Art. 81 of the new Constitution, it has been recognized in practice that the lower courts also have the right to decide constitutional issues. This right was exercised by the court of first instance in the case under discussion.

[2] See Art. 5 and 9 of the Court Organization Law (Law No. 59 of 1947). Recently proposals for reducing the number of Supreme Court judges to 7 or 9 as well as proposals for doubling their number have been put forward.

[3] The six basic codes are the Constitution, the Civil Code, the Commercial Code, the Criminal Code, the Code of Civil Procedure, and the Code of Criminal Procedure.

[4] See Alfred C. Oppler, "Japan's Courts and Law in Transition," Contemporary Japan, vol. 21, No. 1–3, (June 1952), p. 23. The basis of the innovation is Art. 11 of the Court Organization Law.

[5] Justice Saito, the exponent of this view, would have rendered sentence based on the record of the proceedings rather than referring the case to the court of first instance. See Art. 413 of the Code of Criminal Procedure.

a hierarchical structure built around a vertical axis of ascendant-descendant. This family provided a paternalistic model for all other social units including the state, so that the pre-war Emperor system was but the political expression of the family system. Because the family system, extolled by conservatives as the "beautiful custom" of the nation, was long considered as uniquely Japanese, objection to it smacked of subversion.[6]

The family system is connected with other elements of the traditional value pattern, such as hierarchy and harmony. Morality demands the preservation of harmony, and harmony requires that the individual "keep his place"—the status ascribed to him—within the hierarchical order. Human relations are thus concrete and particular status relationships, involving an undefined range of mutual obligations. There is little room for an abstract system of "rights."

Within this framework, the law is subordinate to morality. The law serves those whose position it is to govern as a tool for the enforcement of morality. Morality, not justice, is the end of government.

For some decades, industrialization, urbanization, and other elements of social change have exercised a profound effect on the traditional value pattern. This effect was strengthened by the democratization efforts of the recent occupation. There are those in Japan today who attack the traditional pattern as anachronistic—"feudalistic" is the word commonly used—and those who defend it as the basis of morality and as the essence of Japanese culture. Among some jurists the attack takes the form of an endeavor to disentangle the law from the bonds of morality and to establish it as a separate mechanism of social control. Resenting the paternalistic attitude of past governments toward the people, these jurists are sensitive to laws which would enforce or preach any particular concept of morality.[7]

The Fukuoka Patricide Case illuminates in a flash these conflicts in present-day Japanese society. For this reason it became a *cause célèbre*, arousing widespread comment both inside and outside legal circles.

3. On October 3, 1949, Yamato Toyomi had an argument with his father who accused him of having stolen his brother's overcoat. The father, a quick-tempered man, threw a pan and an iron kettle at Toyomi. The latter threw them back, hitting his father's skull and fracturing it. Death, due to a hemorrhage, resulted by the next morning.

Yamato Toyomi was indicted under Article 205, paragraph 2, of the Criminal

[6] Some observations regarding the social and political significance of the family system are contained in my articles on "Post-War Changes in the Japanese Civil Code," 25 Washington Law Review 288 (August 1950) and on "The Reform of the Civil Codes of Japan: Provisions Affecting the Family," 9 Far Eastern Quarterly 69 (February 1950). When the new Constitution was before the Diet in 1946 only the question of the position of the Emperor aroused more comment than the provisions regarding the family (Art. 24). The latter provision may become again an issue if the present movement toward constitutional revision is successful.

[7] See, e.g., the controversy between Professors Kawashima Takeyoshi and Makino Eiichi, published under the title "Pro and Con of the Legalization of Filial Piety" in Chuo Koron (Central Review), vol. 60, No. 9, (September 1950), pp. 78 ff. (In Japanese). I have touched on the main point of this controversy in my article in 25 Washington Law Review 298.

Code for the crime of wounding a lineal ascendant and thereby causing his death. The court of first instance, the Iizuka Branch of the Fukuoka District Court, found that Article 205, paragraph 2, in providing for a heavier penalty in cases where the victim is a lineal ascendant than in other cases, violated the equality clause of Article 14 of the new Constitution. It applied instead the general provision of Article 205, paragraph 1, and sentenced the accused to three years imprisonment, suspending the execution of the sentence for three years.[8] The prosecution appealed directly to the Supreme Court, which quashed the original decision by a vote of thirteen to two and returned the case to the court of first instance.[9]

4. In the various opinions in the case the comparatively simple constitutional questions are intricately intertwined with larger problems of legal and social philosophy. Because Article 14 of the Constitution specifically prohibits discrimination on the basis of "social status," some of the judges address themselves to the question whether the status within the family—ascendant or descendant—falls within this category.[10] The majority opinion denies it. Justice Saito in his concurring opinion finds that the term "social status" excludes all status "recognized by the Constitution or by other laws, based on reasonable grounds." Thus, laws which make special provision for public officials in order to prevent their abuse of office or to protect the execution of their duties are not unconstitutional. Similarly, the law is based on reasonable grounds when it recognizes the status of lineal ascendants "in order to maintain the national and social order." Justice Mano in his dissent views the question in historical per-

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[8] Article 205 of the Criminal Code reads: "Every person who has wounded another person and thereby caused the latter's death shall be punished with limited penal servitude for not less than two years.

"In case the crime is against a lineal ascendant of the offender or of his (her) spouse, punishment shall be penal servitude for life or not less than three years." [The second paragraph of this article will henceforth be cited as Art. 205 (2).]

The Constitution provides in Article 14: "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."

[9] The Judgment of the Supreme Court may be found in Saikō Saibansho Hanreishū (Supreme Court Reports), vol. 4, No. 10 (1950), p. 235; that of the Fukuoka District Court, *id.*, p. 268. The appeal brief of the prosecution is on p. 259.

Appeals by the prosecution are permitted in the Japanese Code of Criminal Procedure. They are not considered as involving double jeopardy. The appeal system is described in Richard Appleton, "Reforms in Japanese Criminal Procedure under Allied Occupation," 24 Washington Law Review 401 (1949).

[10] Precedent to this, the various opinions discuss the question whether Art. 205 (2) involves such a discrimination. According to the majority opinion, Art. 14 of the Constitution considers the individual only as the "subject" of rights and duties, not as the "object" of various laws. (The lack of clarity in this argument has been criticized in the dissents and in some of the comments on the decision). The lower court and similarly the dissenters find that Art. 205 discriminates by granting to ascendants a greater degree of protection of life than to others, and by differentiating between the case in which the descendant injures his ascendant and the case in which the relation between offender and victim is reversed.

spective and with regard to specifically Japanese circumstances. According to him, the relations between ascendant and descendant under the old family system and those between lord and vassal in feudal times were based on the same principle, viz. a differentiation between persons of superior and inferior status. In perpetuating this status differentiation, Article 205 (2) violates the prohibition of discrimination because of "social status."

In answering the somewhat wider question whether Article 205 (2) violates the general clause of Article 14 ("all people are equal under the law"), all opinions recognize, explicitly or implicitly, that this sweeping generalization is subject to certain qualifications. The majority allows the lawmaker a wide range of discretion outside the specific limitations, imposed by the enumeration of race, creed, sex, social status, and family origin in the article itself. It finds that the Constitution does not prevent individual laws from establishing different standards of treatment—such as age, occupation, or special relationships—where this is required by morality, justice, or the purpose to be served by the law.[11] "The provision under question is based on the demands of morality."

The dissenters find this requirement too vague and warn against an indiscriminate emasculation of the equality clause. Two principles emerge from their opinions: legal differentiation must be "reasonable," and no differentiation is "reasonable" when it is based on concepts which the Constitution specifically aims to "correct" or when it is otherwise counter to the spirit of the Constitution.[12] Here again, historical considerations and a juxtaposition of traditional values and of the values embedded in the Constitution constitute guide posts. The lower court, drawing a parallel between the discrimination of Article 205 (2) and the special punishment previously provided for the vassal who killed his lord, states that "the provision is, in the final analysis, based on a feudalistic concept which is the antithesis of the concepts of democracy and human rights, and which is in conflict with the grand spirit of the Constitution which stresses the legal equality of all human beings."

The majority of the Supreme Court, rejecting this view, points out that many countries have provisions, similar to Article 205 (2) and asserts: "The morality governing the relations among husband and wife, parent and child, and brothers and sisters is the foundation of ethics, a universal moral principle, recognized by mankind without regard to past or present or to East or West—in other words, it is a principle which, from the viewpoint of theory, belongs to the

[11] The majority finds that, provided that such a requirement exists, the choice of alternatives—e.g., the definition of the scope of relatives to whom special provisions apply—is a question of legislative policy, not a constitutional question. A comparative analysis of the case, which is not feasible within a brief note, could fruitfully center around the fleeting similarities and differences of the treatment of some key questions, such as the scope of legislative policy, in the United States and Japan.

[12] The court of first instance apparently felt that the "consciousness of contemporary persons" is also a criterion of reasonableness. In general, there is little Holmesian detachment in any of the opinions.

field of so-called natural law." According to the majority view, this morality is not to be confused with the artificial social system known as the family system.[13]

While the argument thus centers around the question whether the basis of Article 205 (2) lies in a type of morality which runs counter to the purposes of the Constitution, the general problem of the relationship between law and morality is also discussed in all opinions. As we noted, the majority finds no fault with a law which "is based on the demands of morality." Justice Saito joins in this view. On the other hand, the lower court and the dissenters believe that law and morality each have their proper province. This theme is elaborated upon by Justice Mano, who writes: "A rational and democratic state structure differs from a primitive community. In the latter, things moral and things legal are not differentiated, but intermingled; in the former, a differentiation of things legal and things moral in accordance with their proper fields is important." The filial duties of voluntary obedience and repayment of parental kindness are not proper subjects of statutory regulation.[14] Justice Hozumi stresses that filial piety itself is not an issue. "The issue is to what extent a moral principle should be enacted into law and whether it is proper to do so from the viewpoint of the essential limitations of morality and law.... I disagree with the provisions for patricide not because I make light of filial piety, but because I esteem it enough to want to keep it beyond the reach of the law."

By asserting that the family system does not constitute the basis for Article 205 (2), the majority avoids the issue of the relationship of that system to the new Constitution. Justices Mano and Saito, on the other hand, show themselves as protagonists of two ways of life. The former calls for a new filial piety; the latter pleads passionately for gratitude to the "one billion ancestors who lived in Japan" and for all-out efforts "to repel the notions of ingratitude of those who fail to understand morality and aimlessly run after innovations."[15]

5. When the judgment was written, the occupation was nearing its end. The issue of the family system was, of course, not created by it.[16] Nevertheless,

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[13] Chief Justice Tanaka, who joined in this majority opinion, is the foremost Japanese exponent of the theory of natural law. The assumption of universal principles is in striking contrast to the claims of a unique Japanese morality, current especially in pre-war Japan.

[14] Basic to Justice Mano's thought is the connection between democracy, which is based on human dignity and equality, and freedom of will. "The equality of individuals is grounded in the spirit of independence and self-respect under which emancipated and free human beings try to act not in accord with external constraint, but on the basis of their own inner free will; and intrinsically connected with this is the spirit of individual responsibility." It is pertinent to note in this connection that the division between secular and spiritual matters, known to the West, is unknown in traditional Japan, where morality was the concern of the government.

[15] It is interesting to compare the use of the verbal symbols for the clashing ideologies in the opinions of these two judges. The excerpts may convey a picture of the difference.

[16] The former Civil Code recognized the family system, including the controls of the head of the house over its members. Writing in 1912, the father of Justice Hozumi, who was one of the co-authors of the Code, stated that the system embedded in it was suited for a transition stage, in which Japanese society passed from the phase of the family unit to the phase of the individual unit. See Hozumi Nobushige, The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence, (Tokyo, 1912), pp. 8, 51–53.

Justice Saito referred in his opinion to the "national humiliation" and accused the dissenters in sharp language of "sycophancy" and of "feudalistic servility." Subsequently, the question was raised whether the acerbity of his attack was not detrimental to the dignity of the Supreme Court. The Impeachment Committee of the House of Representatives opened an investigation in June 1951, but dropped the matter a month later without preferring an indictment.[17] The Supreme Court also chose not to use its disciplinary powers.

As for the accused in the case, the entire affair proved to be "much ado about nothing." The Fukuoka District Court, to which the case reverted from the Supreme Court, sentenced him again to three years imprisonment, suspending the penalty for a period of three years, basing its conviction this time on Article 205 (2) of the Criminal Code, the constitutionality of which had now been confirmed.

6. Holmes referred to the law as "a great anthropological document." Alas, the lawyer's interest is focussed on aspects of the law which are of more immediate practicality, and the anthropologist is too impressed by the "technicality" of the law to give it more than passing attention, usually in the context of a primitive culture. The document is thus much neglected.

Yet the non-Western societies in their present stage are veritable laboratories for the observation of social and cultural change. Japan, where the change is probably most advanced, emerged from feudalism less than a century ago. Developments, which elsewhere occurred in a far distant past and which extended over hundreds of years, were telescoped into a brief span of time and are still in process before our very eyes. It is apparent even without further analysis of the material presented in this brief note, that the painful tensions which are part of these developments, find clear expression in the law and in court cases. The Fukuoka Patricide Case may thus illustrate the fact that students of all branches of the social sciences could turn with profit to the great anthropological document, the law, as it is unfolding, scroll-like, in present-day Japan.

KURT STEINER*

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[17] The Impeachment Committee of the lower house performs the function of indictment. The decision is rendered by a court made up of members of both Houses of the Diet.

It so happened that at the time a bill to give to the courts increased powers of punishing for contempt was before the Diet. (The notion that such powers are inherent in the courts is not shared in Japan.) The prestige of the courts was thus a particularly sensitive issue. A "Law Concerning Maintenance of Order in the Courtroom" was finally passed in 1952.

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JUDICIAL LAW MAKING IN SCANDINAVIA

There are considerable differences in the process of judicial lawmaking in the three Scandinavian countries.[1] The practice of the Norwegian Supreme Court is perhaps closest to that of the United States; the public and oral voting of the members of the court gives great weight to the reasoned opinion of each individual judge.[2] At the other end of the scale is Denmark, where extremely brief opinions tend to make it difficult or even impossible to ascertain the court's reasoning; only occasionally is this revealed by a study of the record which is generally kept secret.[3] Dissenting opinions in the Supreme Court have been made public only since 1937.[4] Sweden may be said to stand somewhere between the two other countries.[5] Notwithstanding these differences, a consideration of two aspects of the process of judicial lawmaking may cast some light on peculiarities common to the Scandinavian countries.[6] The two aspects to be discussed in this paper are the use of legislative materials (often called "motives") and the theory of precedents.

1. Legislative Materials

For reasons both historical and analytical, Anglo-American law has been reluctant to admit the history of a statute as a legitimate source of judicial interpretation. While this reluctance in part has been overcome in the United States, it still prevails in the British Commonwealth. Scandinavia may be said to take an intermediate position, admitting parliamentary materials of various kinds in certain typical situations.

Even slight indications of legislative intent will be followed where the court finds a complete lack of applicable rules after having consulted the terms of the statute as well as possible analogies. Thus, on the question whether the deceased's children competing with his spouse were entitled to $^5/_{12}$ or $^9/_{12}$ of the estate, the Norwegian Supreme Court resorted to a committee report.[7]

Similarly, a court will feel entitled to consult such reports when dealing with

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[1] H. Munch-Petersen, Den danske Retspleje I–II (2d 1923–1924); Stephan Hurwitz, Tvistemål (1941); Jon Skeie, Den norske civilprosess (2d ed. 1939–1940); E. Kallenberg, Svensk civilprocessrätt (2d ed. 1939); Per Olof Ekelöf, Kompendium över Civilprocessen I–III (2d ed. 1951–1952).

[2] Almost all decisions of the Norwegian Supreme Court are published in Norsk Retstidende.

[3] All decisions of the Danish Supreme Court are published in Højesteretstidende and most of them in Ugeskrift for Retsvaesen.

[4] Act No. 112, April 7, 1936.

[5] Most of the Swedish decisions are published in Nytt Juridisk Arkiv. Only the dissenting opinions are explicit, whereas the majority prefer to take cover behind a very brief statement.

[6] See von Eyben, Domstolenes stilling til lovmotiver, Tidsskrift for Rettsvitenskap, [1953] 145–192.

[7] Norsk Retstidende, [1951] 965; Ragnar Knoph, Norsk Arveret (2d ed. by Hans Lütken, 1944) 137–138. For other illustrations see Norsk Retstidende, [1952] 566; and Ugeskrift for Retsvaesen, [1930] 782.

erroneous draftsmanship or linguistic vagueness in a statute. Thus, the Danish Supreme Court apparently relied on a report of a committee of expert draftsmen when denying the applicability of suspended sentences in a certain doubtful situation.[8] Another outstanding example of this technique is that used in a decision by the same court concerning the question whether the strict liability statute for railroads was applicable to a sugar beet railway, which owned one of the largest private rail systems in the country. Answering the question in the negative, the court relied primarily upon a statement by a member of a parliamentary committee to the effect that the statutory term "railroads" referred to "permanent tracks constructed under special railroad statutes, so that . . . beet tracks . . . do not fall within this category."[9] Although there was no evidence that the committee had agreed on this construction, the court apparently felt that the spokesman for the committee would not have made this remark had he not been sure of such agreement.

In evaluating remarks made on the floor during a parliamentary debate, stress will usually be laid upon whether the particular remark was one made incidentally without provoking a controversy, or whether it formed the subject of subsequent discussion. Only in the latter case, usually, though not generally, will the remark be usable in the judicial interpretation of a statute.[10] Moreover, special significance will be attributed to the fact that a statute which is considered doubtful is alleged to replace another statute whose meaning has been clearly established. It has been held repeatedly that in such cases the prior state of the law is entitled to a presumption of continued effect,[11] and this conclusion is generally based on arguments drawn from parliamentary records. On the other hand, if an amendment has been proposed during a parliamentary debate, the presumption will usually be in favor of an intended change in the law.[12]

In Scandinavia as in other countries, the use of legislative materials has often been criticized. It has been pointed out that such materials are usually inaccessible to the public and therefore should not be referred to as a source of legal duties not apparent from the statute itself. Moreover, it is generally recognized that a court purporting to rely on such materials will often merely try to rationalize a conclusion reached in other ways. Be this as it may, reference to legislative materials has become an accepted part of Scandinavian judical techniques.

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[8] Højesteretstidende, [1934] 56; Ugeskrift for Retsvaesen, [1945] 64.

[9] Ugeskrift for Retsvaesen, [1945] 64.

[10] See *id.*, at [1941] 529; [1940] 594; [1936] 74; [1930] 375; [1930] 525. In the last case the court chose to rely on the remarks of the *last* speaker. This choice seems open to doubt. Parliamentary discussions were ignored as inconclusive in Ugeskrift for Retsvaesen, [1952] 1097; [1927] 19; [1926] 940; [1868] 467. In the only case in which the court rejected an unambiguous statement (*id.*, [1929] 609) the suggested solution would clearly not have been feasible.

[11] Norsk Retstidende, [1952] 566; Ugeskrift for Retsvaesen, [1952] 1033; [1934] 493.

[12] Ugeskrift for Retsvaesen, [1950] 829; [1946] 786, 1314; [1928] 673.

2. Precedents

During a period in which the common law and the civil law orbits are approaching each other in the treatment of court decisions as a source of law, the fact that in this respect, also, Scandinavian law has long taken an intermediate position should be of some interest. Scandinavian courts will neither, like the House of Lords, treat a case as establishing a legal rule with binding effect nor, like many Continental courts, purport to consider a judicial decision as mere application rather than creation of law. The answer will be found in each particular case by virtue of various equitable considerations.

A Scandinavian court will rarely deviate from a principle adopted in a prior decision if that decision was likely to have induced the party to adopt a certain procedure. This has been held in cases involving corporate taxation[13] and the construction of covenants.[14] Distinguishing other fact situations on the same ground, the Norwegian court felt free to disregard a prior practice concerning a prisoner's claim to notification of the time of his trial.[15] Similarly, Danish courts have disregarded earlier decisions concerning prohibitions of certain lotteries[16] and the admissibility of blood tests in paternity cases.[17] In general, Scandinavian courts have felt that, except in extreme cases, people do not expect courts to maintain a prior position without regard to the equities of the particular case or a change in general attitudes.

Deviation from prior practice has been found particularly easy where such deviation was necessarily gradual as in the assessment of damages in tort or contracts. Thus, the liability for harm caused by slippery sidewalks or defective balconies has undergone a slow tightening process.[18] Such gradual change has proved beneficial in that it has induced those potentially liable to increase their care.

Moreover, Scandinavian courts are likely to differentiate according to whether the prior holding has remained limited to one case or a few cases or whether it represents an established practice.[19] But it should be kept in mind that in proper cases even a single decision, particularly where it has been fully accepted over a period of time and there has been reliance on its authority,[20] will be given the same effect as precedent that it would have in American courts.

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[13] *Id.*, [1948] 72. See also *id.*, [1915] 393, relieving a corporation from taxation in view of such relief previously granted to another corporation of similar structure. *Cf.* the comments by Justice Drachmann Bentzon in Tidskrift for Retsvitenskap, [1948] 342.

[14] Ugeskrift for Retsvaesen, [1935] 1053. *Cf. id.* at [1895] 932; [1899] 906.

[15] Norsk Retstidende, [1947] 680.

[16] Ugeskrift for Retsvaesen, [1954] 57. *Cf. id.* at [1908] 318; [1912] 177.

[17] Ugeskrift for Retsvaesen, [1953] 51. *Cf. id.* at [1952] 439; 849.

[18] See Henry Ussing, Erstatningsret (1937) 11. See also Anders Vinding Kruse, Misligholdelse af ejendomskøb (1954) 166, concerning a gradual mitigation of the seller's liability for defective timber.

[19] See Viggo Bentzon, Retskilderne (1905) 110; Trolle, Juristen, [1953] 120; Arnholm, Tidsskrift for Rettsvitenskap, [1933] 170; Norsk Retstidende, [1952] 566; [1924] 18; [1908] 631.

[20] Arnholm, Tidskrift for Rettsvitenskap, [1933] 168. *Cf.* the decisions Retstidende, [1952] 574; *id.* [1908] 631, where the absence of reliance was specifically emphasized.

Finally, an older decision is more likely to be discarded than one of recent origin, for the obvious reason that both reliability and actual reliance are considerably weakened.[21] And decisions of lower courts will of course be given less deference than those of higher courts. In this last respect, however, there exists a significant difference between Swedish and Danish practice. In Sweden, a parliamentary committee recently refused to take action upon the Solictor General's complaint directed against a lower court refusing to follow a Supreme Court decision.[22] In contrast to the complaint which stressed any public servant's duty properly to perform his task, the committee pointed out that only the reasoning rather than the actual holding of the higher court was entitled to the lower court's respect. In Denmark, both doctrine and court practice give considerably greater weight to precedent in order to avoid hardship to parties relying thereon.[23]

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[21] Ugeskrift for Retsvaesen, [1942] 356. *Cf.* Højesteretstidende, [1858] 406; Ugeskrift for Retsvaesen, [1925] 916; Ugeskrift for Retsvaesen, [1898] 443; Juridisk Ugeskrift, [1869] 152.

[22] Riksdagens Protokoll 1947, I, 3–4, referring to Justitieombudsmannens embedsberetning 1946.

[23] See Ekelöf, Kompendium över Civilprocessen III (1952) p. 81; K. Schlyter, Thore Engströmer, Karl Olivecrona, Per Olof Ekelöf in Svensk Juristtidning, [1947] 285–93.

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THE PRIVILEGE AGAINST SELF-INCRIMINATION IN ANGLO-AMERICAN AND JEWISH LAW[1]

The old doctrine "nemo tenetur prodere seipsum,"[2] commonly known as the privilege against self-incrimination, is recognized as a fundamental principle

[1] Jewish Law may be defined, briefly, as the legal elements contained in the *Books of Moses*, the *Pentateuch* (in Hebrew the *Torah*) and their natural development as *Tradition*. The *Tradition* was the "common law" of the Jews and consisted, in the main of an authoritative interpretation of the *Pentateuch*. The rules and norms of the *Tradition* were officially collected and published in the *Mishnah* (219 C.E.). Jewish law was further developed by the Jewish Academies and the Jewish courts. Their decisions and opinions were compiled in the *Talmud* (557 C.E.) and further in the numerous *Responsae*. Note that all decisions and opinions had to be based on the norms and rules set forth in the *Pentateuch*. Jewish law was codified in Maimonides, *Mishneh Torah* (1168) and in Karo, *Shulhan Aruk* (1550). G. Horowitz, *The Spirit of Jewish Law* 1–104. (New York, 1953) also, S. Mandelbaum, *Comparative Study in the Laws of Evidence*, (unpublished thesis in Harvard Law School Library, 1955). Today Jewish law (distinguished from Israeli Law which is in main based on English common law and Turkish (Ottoman) law) is practiced by the rabbinical (religious) courts in the State of Israel, where exclusive jurisdiction is had in regard to matters of personal status, such as marriage and divorce. Sussmann, "Law and Judicial Practice in Israel," 32 J. Comp. Leg. & Int'l L. (3d ser) (1950) 29, also Yadin, "Sources and Tendencies in Israel Law," 99 U. Pa. L. R. (1951) 561.

[2] "No one is required to accuse himself."

in Anglo-American Law, a "result of a long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the state on the other."[3] Its embodiment in the Fifth Amendment of the United States Constitution has been characterized as "one of the great landmarks in man's long struggle to make himself civilized."[4]

In Anglo-American law, this privilege is traced back to the middle of the seventeenth century.[5] As has been observed, "We owe the privilege of today primarily to John Lilburn."[6] In the year 1637, John Lilburn was hauled before the star Chamber on the charge of having imported certain heretical and seditious books. On trial, he refused to answer any impertinent questions for fear that "with my answer I may do myself hurt." He also refused "to take an oath to answer truly" and consequently was sentenced by the court to a jail term and fine for his refusal. After his vigorous protest, the House of Commons voted in 1641 that "the sentence was illegal and against the liberty of the subject."[7]

This privilege came to the United States "as a part of the legal heritage of our early settlers"[8] and made its way into the Constitution of the United States (in 1791).[9] In tracing back the doctrinal theory of this privilege, it is of interest to find that "the privilege appears, by no means, to have been regarded in England as the constitutional landmark that the later American legislation has made it." [10] Mr. Justice Stephen, who has outlined the true history of the privilege, says in his summary that "the rule arose from a peculiar and accidental state of things which has long since passed away and that our modern law is in fact derived from somewhat questionable sources though it may no doubt be

[3] Brown v. Walker, 161 U.S. 591. 637 (1891).

[4] E. Griswold, "*Per Legem Terrae*," 39 Mass. L.Q. (1954) 82.

[5] Note, that during the years 1300–1600 different statutes were enacted which in effect forbade any ecclesiastical court in England the administration *ex officio* of any oath whereby a person shall be obliged to make presentations or to accuse himself of any crime. (The first of these statutes, De Articulis Cleri, is attributed to the end of King Edward II's reign, 1326.) However, as already explained by Wigmore, 8 Wigmore, Evidence, 2250 (3rd ed., 1940, hereafter cited as Wigmore) these statutes resulted from the controversy between the state courts and the ecclesiastical courts, in which the common law courts sought to establish their own superior authority and to keep the church courts in their proper boundaries. Thus, these statutes did not object to the compulsion in itself of answering an oath, the objection was rather jurisdictional; *who* shall require the oath? In short, all the statutes up to the seventeenth century did not aim to protect a person against self-incrimination *per se* but against its oppressive exaction by the Church. For a comprehensive historical background, see *ibid.* But for a contrary view, *cf.*, E. M. Morgan, "The Privilege Against Self-Incrimination," 34 Minnesota Law Review, (1949–50) 1.

[6] E. Griswold, "Fifth Amendment," 40 A.B.A.J. (1955) 502, 533; 39 Mass. L.Q. (1954) 414.

[7] Lilburn's Trial, 3 How St. Tr. 1315 (1637–45).

[8] E. Griswold, "Fifth Amendment," 40 A.B.A.J. (1955) 502, 533, 39 Mass. L.Q. (1954) 414.

[9] For early American cases see Yntema, "The Antecedents of Examination Before Trial in New York," 34 Colum. L. Rev. (1934) 831.

[10] 8 Wigmore 2250.

defended."[11] Wigmore, discussing the same problem, concluded "that as a bequest of the 1600's it is but a relic of controversies and convulsions which have long ceased, its origin was local, in the other legal systems of the world it had no original place."[12] Granted that the origin of the privilege at common law is rather obscure, we should, however, take exception to Wigmore's statement that "in the other systems of the world it had no original place,"[13] since the ancient sources of the Jewish Law and the numerous cases which were decided by the Jewish courts during the first five centuries of our common era evidence a comparable rule in early Jewish law.

The basic rule which Jewish law promulgated for protection against self-incrimination, is demonstrated in two cases cited by the Talmud:[14] a proceeding against a defendant for accepting bribery;[15] a proceeding against a defendant for committing adultery.[16] In both cases, the prosecution could not produce any witnesses to testify against the defendants, and requested the court to hear and admit in evidence the testimony of the defendants themselves admitting their respective crimes.[17] The request of the prosecution was rejected in both instances and the defendants acquitted. The grounds stated for this decision were that the prosecution failed to substantiate its charges against the defendants by any evidence; the defendants were not allowed to testify, since the court was bound not to request or admit such testimony or statements in evidence as would incriminate the defendants: "a person cannot accuse himself." This statement by the court that "a person cannot accuse himself" was subject to various interpretations. Some Jewish scholars[18] regarded such a prohibition as linked to the Biblical rule which excluded a kinsman from testifying in a suit involving another kinsman.[19] "If a person cannot testify against his brother, how could we allow his testimony against himself?"[20] On the other hand, other scholars explained that the reason why a person was not bound to accuse himself was that there is an irrebuttable presumption that "a person really never intends to testify against himself voluntarily."[21] The court is

[11] Stephen, "The Practice of Interrogating Persons Accused of Crimes," 1 Juridical Society's Papers (1857) 465, 470.

[12] 8 Wigmore 2251.

[13] *Ibid.*

[14] The Talmud (completed 557 C.E.) is a compilation of all cases, opinions, discussions, and biblical interpretations given by Jewish scholars, religious academies, and the Jewish courts beginning with the Biblical era until the fifth century A.D. The Talmud marks the culmination of writing of Jewish tradition and is considered the basic source of Jewish law; see note 1 *supra*.

[15] Talmud (hereafter cited T.); Ketubot 18b.

[16] T., Sanhedrin 9b.

[17] It should be observed that in these cases the question of admissibility of evidence, as well as the so-called privilege against self-incrimination, was involved.

[18] See Rashi (1040–1105), *ibid.*

[19] *Id.*, 27–29; also Deuteronomy 24 (16). Note that at common law all relatives except spouses were qualified to testify. 2 Wigmore 731.

[20] See Tosaphot (1171), *id.*, 9b.

[21] Responsae Rosh (1250–1328), Sanhedrin 60 (1).

therefore bound to protect such right of a person not to testify against himself. This view thus is that protection of personal liberty was the reason for the rule against self-incrimination at Jewish law.

Now, if the rule pronounced in the Talmud be compared with the Anglo-American privilege against self-incrimination, the following observations may be drawn. Anglo-American law has created a privilege of "silence," i.e., the right of a person not to be compelled to give evidence which may incriminate him. Anglo-American law does not forbid, however, a person from waiving his "right" and testifying against himself.[22] Jewish law, on the other hand, provided for an absolute protection which cannot be waived by the person concerned.[23] Jewish law, therefore, will require the court to strike out of the record any self-incriminatory statement, even if it had been given voluntarily. In short, while Anglo-American law recognizes a "privilege," Jewish law created a "natural right."[24]

While the Anglo-American privilege against self-incrimination thus differs somewhat from the comparable rule in Jewish law, it should be observed that both systems are identical with regard to the scope and application of the rule. Both systems hold that the protection against self-incrimination applies only to criminal cases, penalties, and forfeitures. No privilege exists in matters tending to establish a debt or to subject one to a civil action not in respect of penalties or forfeitures, e.g., cases involving liquidated damages as distinguished from penalties.[25] In civil cases which involve a criminal act as a source of liability, each system offers its own solutions. While at common law the privilege would apply,[26] Jewish law approached the problem differently. In one case, a person was charged with setting fire to a neighbor's property on the Sabbath. Judgment was requested[27] for money damages as well as penalties for the violation of the rules of the Sabbath.[28] The defendant offered his own confession in evidence. It was decided that the testimony should be admitted only as it related to the civil suit and not for the purpose of criminal conviction.[29] A similar solution was offered by the Jewish courts in another case where a woman was seeking the court's permission to remarry. She contended that her former husband, who had disappeared from home, was dead. To establish the husband's death,

[22] 8 Wigmore 2268. But see Cooley, Constitutional Limitations (8th ed., 1927) 660; also T. Sherbow, "Self-Incrimination and the Waiver Thereof," 10 Md. L. Rev. (1949) 165–68.

[23] T., Sanhedrin 9b.

[24] *Cf.* East India v. Atkins, 1 Stra. 168 (1715). Note that it is thus evident that defendant's confession could never be presented before the Jewish court. Horowitz, *op. cit., supra,* note 1 at 641.

[25] Rashi (1040–1105); T., Yebamot 25b; 8 Wigmore 2254, 2256. In those civil cases where the privilege did not apply, Jewish courts used the maxim: "admission by a litigant is stronger than that of a hundred witnesses." T., Baba Metzi'a 3b.

[26] 8 Wigmore 2257.

[27] Jewish law permitted civil and criminal actions to be brought together in one proceeding.

[28] Setting a fire on the Sabbath was considered by the Torah as a criminal violation. Exodus 35 (3).

[29] Maimonides, Mishneh Torah, Evidence, Ch. 12 (2) (1168).

she called a witness who testified that he himself killed the husband. The court granted the requested permission to the woman. The court in its opinion stated that although the testimony was self-incriminatory in nature, the court could split the testimony and accept the part which established the death of the husband. The court added that such testimony could not be used to convict the witness for murder.[30]

After examining the sources of Jewish law which disclose that a doctrine protecting against self-incrimination existed long before such a doctrine was established in the common law, we may ask ourselves whether there is any direct lineage between the doctrine in Jewish law and the common law. In the original report of Lilburn's Trial,[31] it will be remarked that one of the strongest arguments Lilburn used to justify his refusal to answer to incriminating questions or to take an oath to answer truly, was that "such practice would be contrary to the laws of God, for that law requires no man to accuse himself."[32] Lilburn seems to indicate that such was the practice of the courts in Palestine, "for Christ himself in all his examinations before the high priest[33] would not accuse himself but upon their demands returned back, Why ask you me? Go to them that heard me."[34] The numerous references in Lilburn's Case suggest the possibility that "many of our common law principles and many of the legal forms and customs which we find difficult to explain, trace their origin more or less directly to sources in the Written and Oral Law of the Jewish people,"[35] and, specifically, that "there is a striking coincidence in the legal thinking in evidence in both systems."[36]

SIMCHA MANDELBAUM*

[30] T., Yebamot, 25b.

[31] Lilburn's Trial, 3 How. St. Tr. 1315 (1637–45).

[32] *Ibid., passim.*

[33] The High Priests served as justices in Palestine between 586 B.C.–70 C.E. Horowitz, *op. cit., supra,* note 1, at 72.

[34] *Id.* at 1333.

[35] C. Auerbach, "The Talmud—A Gateway to the Common Law," 3 Western Res. L. Rev. (1951) 8.

[36] 1 Herzog, The Main Institutions of Jewish Law (London, 1939) 15.

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NEW LEGISLATION

VENEZUELA. CONDITIONAL SALES—By a law of April 14, 1955 (Gaceta Oficial, No. 452 Extra. April 21, 1955), Venezuela joins the ranks of Latin-American countries that expressly authorize conditional sales. The great weight of opinion had always been that under Venezuelan law, such sales were impossible; the contract of sale *ipso facto* transferred title to the purchaser. Consequently, the system of hire-purchase contracts was in general use for instalment sales, but

after the adoption of a new Civil Code in 1942, they had no legal validity, since article 1579 of the Code deemed leases of movables entailing an obligation to transfer title to be instalment sales (Castillo Lara: *Ventas a Plazos*, 2 Revista del Ministerio de Justicia, No. 5, April–June 1953, 57).

The new law authorizes reservation of title in the vendor (art. 1), with certain exceptions (arts. 2–5), for a term not exceeding five years (art. 11). No recording in a public office is required, but to be effective against third parties, the contract must bear an authentic date certain, which may be evidenced by filing in a notarial office or court (art. 7). The vendor is not entitled to repossession if the buyer's default is for less than one-eighth of the total purchase price (art. 14) and on repossession, he is bound to return the instalments paid less the fair rental value of the article and damages suffered; if liquidated damages are provided for in the contract, the court may reduce the amount if more than one quarter of the price has been paid (art. 14). Against a buyer in good faith in market overt or at public sale, the vendor's right is subject to repayment to such buyer (art. 12). Other articles make provision as to insurance (art. 13), bankruptcy (arts. 18, 19), and a short statute of limitations (art. 20). The new statute is an improvement over the prior law, but it is doubtful whether it affords such sufficient protection to the seller as to stimulate business and promote the growth of finance companies. It may be the part of wisdom not to encourage instalment buying.

PHANOR J. EDER*

* Board of Editors.

DECISIONS

RENVOI AND CONTRACTUAL CHOICE OF LAW—Any decision of the Court of Appeals for the Second Circuit on a question of conflict of laws is of considerable importance, and *Siegelman v. Cunard White Star Ltd.*, 221 F. 2d 189 (2d Cir. 1955) is no exception. For the decision involved discussion (with interesting dissension within the Court) of two controversial and unsettled issues in this branch of American law—the choice of law to govern questions arising under an "international" contract, and the doctrine of "renvoi."

The suit was brought by Mr. Elias Siegelman, both in his own right and as administrator of his wife's estate, to recover damages for injuries suffered by his wife in the course of a voyage from New York to Cherbourg on the Cunard liner R.M.S. Queen Elizabeth.[1] Clause 20 of the "Terms and Conditions" of Mrs. Siegelman's ticket for this voyage, purchased from a Cunard agent in New York, provided that "All questions arising on this contract ticket shall be decided according to English law with reference to which this contract is made."

[1] Mrs. Siegelman's death was not alleged to be connected with her injury.

At first glance, this seems a clear case of an express declaration by the parties respecting the law intended to govern their contract, and so it was interpreted by two of the three judges of the Court of Appeals—Clark and Harlan—in an opinion written by the latter. As this was a "maritime tort," the doctrines of the *Erie* and *Klaxon* cases were not applicable, and a "federal" conflicts rule was to be applied.[2] While noting that there was "much doubt" whether parties could stipulate the law by which the validity (as distinct from the interpretation) of their contract was to be judged, Judge Harlan could "see no harm in letting the parties' intention control" in the case before the court.[3]

Judge Frank, in dissenting, noted that this was an "adhesion contract" to which the application of the "intention of the parties" rule was artificial to a degree;[4] but even on the assumption that the "choice" of English law ought to be given effect, he disagreed with his colleagues' view on the *nature* of that choice. It is with this latter aspect of Judge Frank's dissent that this note is concerned. Was the reference contemplated by clause 20 to "English law" a reference to the *whole* of English law, including its conflicts rules, or merely to what might be variously described as its "domestic" or "municipal" law? "That is, (were) questions to be decided according to the law of England, or instead, as an English court might decide them, applying where appropriate the law of some other country?"[5] To Judge Harlan the answer was clear—the reference must be to the "domestic"[6] law, "for surely the major purpose of including the provision in the ticket was to assure Cunard of a uniform result in any litigation no matter where the ticket was issued or where the litigation arose, and this result might not obtain if the 'whole' law of England were referred to."[7]

Given the applicability of the "intention of the parties" rule to the case, this reasoning seems so entirely proper that Judge Frank's dissent may seem, at first, somewhat surprising. Yet to him, the argument of the majority failed to meet two major "difficulties":[8] the first was the prior decision of the Court in *Mason v Rose*;[9] the second, the decision of the Judicial Committee of the English Privy Council in *Vita Food Products Inc. v Unus Shipping Co. Ltd.*[10] Both decisions, in Judge Frank's view, indicated that in a case such as this reference must be made to the whole of the stipulated law, including its conflicts rules;

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[2] 221 F.2d 189, 192–3. Erie Railroad v Tompkins, 304 U.S. 64 (1938); Klaxon Co. v Stentor Mfg. Co., 313 U.S. 487 (1941).

[3] 221 F.2d 189, 195. He regarded the question here as *sui generis*.

[4] *Id.* at 204–6. This section of Judge Frank's opinion, entirely realistic and of great significance, will not be further adverted to here. See Ehrenzweig, "Adhesion Contracts in The Conflict of Laws," 53 Colum. L.Rev. (1953) 1072, cited with approval.

[5] 221 F.2d 189, 194.

[6] Judge Harlan's opinion uses the word "substantive," an unusual choice.

[7] 221 F.2d 189, 194.

[8] *Id.*, at 203.

[9] 176 F.2d 486 (2d Cir. 1949).

[10] [1939] A.C. 277 (P.C.).

he observed that his colleagues too had cited the *Vita Food* decision, while noting in their citation its lack of accord with their own conclusion.[11]

Behind this judicial disagreement, though unacknowledged as such in the opinions, lies, of course, the "renvoi" controversy. Judge Harlan was in effect holding the "renvoi" doctrine inapplicable to this particular branch of the conflict of laws (international contracting), at least to the extent that the "intention of the parties" rule was to prevail, while Judge Frank held it applicable. To both judges, the decision in the *Vita Food* case seemed significant; to the latter, it may perhaps have been decisive.[12] It can be expected that the decision of the Court of Appeals in this case will carry considerable weight throughout the country, and that the reasoning in both the court opinion and the dissent will be subjected to close attention hereafter. For this reason, if for no other, it seems desirable for a Commonwealth lawyer to sound a note of warning against the uncritical acceptance of the *Vita Food* "decision" as a significant and meaningful contribution to the English law on "renvoi."[13]

Vita Food Products Inc. v Unus Shipping Co. came to the Judicial Committee of the Privy Council on appeal from the Supreme Court of Nova Scotia.[14] It is important to note at the outset that this was not a decision of a court within the domestic judicial system of England—the Judicial Committee sat as the

[11] 221 F.2d 189, 203. The reference is to a passage at 195.

[12] Mason v Rose (*supra* note 9) was clearly distinguishable. True, English *conflicts* law was there applied as the governing law of a contract, but (i) it was not a case involving an express choice of law, and (ii) it was not decided upon the "intention of the parties" rule. The question whether "renvoi" is appropriate to a case decided upon an imperative *"lex contractus"* rule (as in Mason v Rose) is not the same as the question of its consistency with the "intention of the parties" rule (as applied in the Siegelman case). See Fahs v Martin, 224 F.2d 387 (5th Cir. 1955) at 398, footnote 9, for a reference to the possible use of "renvoi" on the application of an imperative *"lex contractus"* or *"lex loci solutionis"* rule.

But note Duskin v Pennsylvania-Central Airlines Corpn., 167 F.2d 727 (6th Cir. 1948), cert. den. 335 U.S. 829 (1948)—employment contract—provision that Pennsylvania law to govern—reference to *conflicts* law of Pennsylvania and decision thereunder in accordance with Alabama law (place of injury). Subsequent citation of this decision, including a citation by Judge Harlan in the instant case (221 F.2d 189, 195), has been without reference to the use of "renvoi." So far it stands alone on this point, and, it is submitted, is unsatisfactory in reasoning if not in result for the very reasons that render the Vita Food dictum unsatisfactory.

[13] The Vita Food decision has already received attention in this country for its support of the "intention of the parties" rule. It is, for example, discussed at length by W. W. Cook "The Logical and Legal Bases of the Conflict of Laws" (1949) Ch. XV, referred to by Rabel "The Conflict of Laws: A Comparative Study" (1947) Vol. 2 esp. pp. 364, 404–5, and noted by Goodrich "Handbook of the Conflict of Laws" (3rd. ed., 1949) 329n. Judge Harlan, in the instant case, referred to the note on Vita Food in 40 Colum. L. Rev. 518, and to the note "Commercial Security and Uniformity through Express Stipulations in Contracts as to Governing Law," 62 Harv. L. Rev. 647 (1949) (221 F.2d 189, 194, 195). To the writer of the latter, "the line of cases approving the principle of recognizing express stipulations culminated . . . in the famous *Vita* case," (655) and, while noting criticism of the decision in a footnote, he concluded that "the British cases . . . furnish the advocate with a source of precedent to persuade our courts to uphold stipulations." (655).

[14] [1938] 2 D.L.R 372. [1939] A.C. 277 (P.C.)

supreme appellate tribunal of the judicial system of Nova Scotia—and that the decision does not constitute a binding precedent for English courts properly so-called. Nevertheless, it was a decision delivered in effect by the *alter ego* of the House of Lords,[15] and is therefore entitled to profound respect in English and other Commonwealth courts.

The case concerned a bill of lading entered into in Newfoundland which expressly provided that "This contract shall be governed by English law." In holding that this expressed intention of the parties was to be given effect, their Lordships, in a judgment delivered by Lord Wright, said:[16]

"There is, in their Lordships' opinion no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with S.3 of the (Newfoundland) Act."

It was to this portion of the judgment that attention was directed in the Second Circuit Court of Appeals. What, indeed, could be clearer—but does it represent the law?

An examination of reported cases reveals that the *Vita Food* dictum has in fact been consigned by the judges to quiet oblivion. The English and Empire Digest lists only two subsequent references to the decision, neither of which bears upon the point now under discussion.[17] In considering and applying the "intention of the parties" theory of the "proper law," English and other Commonwealth courts have studiously ignored the "renvoi" dictum.[18]

To the silence of the judges must be added the hostility of the commentators. Initial law journal reaction to this portion of the *Vita Food* decision was universally unfavorable. Professors Morris and Cheshire thought it "remarkable and disquieting," "novel and unsound," clearly *not* calculated to effectuate the

[15] The Board on this occasion consisted of Lord Atkin, Lord Russell of Killowen, Lord MacMillan, Lord Wright, and Lord Porter.

[16] [1939] A.C. 277 at 292.

[17] Canada and Dominion Sugar Co. v Canadian National (West Indies) Steamships Ltd. [1947] A.C. 46 (P.C.); Minister of Food v Reardon Smith Line Ltd. [1951] 2 T.L.R. 1158 (K.B.D.). References to the decision in other Commonwealth courts are few and equally innocuous. After this note was written, Vita Food was relied upon in In re Claim by Herbert Wagg & Co., Ltd. [1956] 2 W.L.R. 183 (Ch.D.) to establish German law as the "proper law" of a contract; German moratorium legislation was applied, and "renvoi" was not adverted to.

[18] Illustrative recent cases include: Mahler v Midland Bank [1950] A.C. 24; Zivnostenska Banka National Corpn. v Frankman [1950] A.C. 57; Re Banque des Marchands de Moscou (Koupetschesky) [1952] I All E.R. 1269 (Ch.D.); D'Almeida Araujo (J.) Lda. v Becker (Sir Frederick) and Co. Ltd. [1953] 2 Q.B. 329; The Assunzione [1954] P. 150 (C.A.). Anspach (George C.) Co. v Canadian National Railways [1950] Ont. 317, 3 D.L.R. 26 (Ontario High Court). Bonython v The Commonwealth (1947–8), 75 Commw. L.R. 589, 601–2 (per Latham C.J.) (High Court of Australia). In a passage in his judgment in Kahler v Midland Bank (*supra*, 47), Lord Reid seemed to be defining the proper law of a contract in terms of the "foreign court" theory of "renvoi"; but the case did not concern an express choice of law, nor was reference made to the Vita Food dictum or to the doctrine of "renvoi"; in any event, his Lordship's statement was not unambiguous, and should clearly not be isolated as a judicial pronouncement of weight and importance.

intention of the parties.[19] Kahn-Freund made the same point—"if the parties submit to English law they want their agreement to be governed by the rules of English municipal law and not to be referred to a third system."[20] So too did a writer in the Columbia Law Review, commenting that the introduction of "renvoi" into this field turned the "intention of the parties" rule into "an empty gesture."[21]

To Dean Falconbridge, the flat statement of the Privy Council was so unsatisfactory that he could only conclude that it was "perhaps a *lapsus calami* on Lord Wright's part."[22] He found it hard to believe that his Lordship could actually be introducing the doctrine of "renvoi" into this field of conflict of laws "without mentioning the doctrine or discussing any of its implications and difficulties,"[23] and he cited cases exemplifying (in his opinion) the application of English domestic law in its character as the proper law of particular contracts.[24]

This suggestion of a *lapsus calami*—a mere slip of the pen—is not so fanciful as it might at first appear. The Privy Council was, after all, sitting in England, and was made up of English judges. Lord Wright had already noted that Nova Scotian conflicts law, so far as relevant, was identical with English conflicts law.[25] The reference (it is to be surmised) was to English domestic law *qua* the law intended by the parties, by way of "English" conflicts law *qua* the conflicts law of Nova Scotia; his discussion of the question of illegality at the place of performance was in the context of "English" conflicts law *qua* the conflicts law of Nova Scotia, rather than in the context of English law *qua* the "proper law" of the contract. Falconbridge believes that what Lord Wright *meant* to conclude was that

> "in accordance with the conflict rules of Nova Scotia (which are identical for the present purpose with English conflict rules) domestic English law must be applied to determine how far the bills of lading are affected by the failure to comply with S.3 of the Newfoundland statute."[26]

The passage of the years has led to no modification of these initial opinions. Cheshire, in the 1952 edition of his textbook, does not discuss the point, but in his chapter on "Contracts" refers his readers by footnote to (*inter alia*) his joint article with Morris already referred to and to the views of Falconbridge;[27]

[19] "The Proper Law of a Contract in the Conflict of Laws," 56 L.Q. Rev. 320, 333, 335 (1940).

[20] 3 Modern L. Rev. 61, 66 (1939).

[21] 40 Colum. L. Rev. 518 523 (1940).

[22] "Bills of Lading, Proper Law and Renvoi," 18 Can. B. Rev. 77, 84 (1940). *Lapsus calami* —"a slip of the pen" (Webster).

[23] *Ibid.* 85.

[24] Jacobs v Credit Lyonnais (1884) 12 Q.B.D. 589 (C.A.); Ralli Bros. v Compania Naviera Sota y Aznar [1920] I K.B. 614; Foster v Driscoll [1929] I K.B. 470 (C.A.).

[25] [1939] A.C. 277 at 289–290.

[26] *Supra* note 20, at 85.

[27] "Private International Law" (4th ed. 1952) 208n.

the *Vita Food* decision receives no mention at all in his section on "renvoi." Falconbridge incorporated his article in his text on *The Conflict of Laws*.[28] Morris, as general editor of the 6th Edition of *Dicey's Conflict of Laws*, lends the authority of that standard work to his rejection of Lord Wright's dictum, adopting Falconbridge's view that it is to be regarded as a slip of the pen and not to be taken seriously.[29] Graveson refers to the dictum in a footnote, without comment;[30] Schmitthoff[31] and Wolff[32] disregard it altogether. Not even reluctant recognition has been extended to the doctrine of "renvoi" in this field.

It is submitted, then, that if and so far as American courts may wish to avail themselves of English law with respect to the doctrine of "renvoi," or the "intention of the parties" rule in the conflicts law of contracts, it is desirable that they be fully aware that the dictum of Lord Wright in the *Vita Food* case, so clear and strong on its face, has received neither approval nor application in those courts to which it is immediately relevant, nor even the blessing of textwriters. It would be unfortunate if it were cultivated in an alien soil solely in the belief that it grew and flourished in its native pastures. Chief Judge Clark and Judge Harlan resisted the temptation to apply it in the *Siegelman* case; it is to be hoped that other American courts will follow their example.

ROBIN L. SHARWOOD*

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[28] "Conflict of Laws" (1947) Ch. 16.

[29] "Dicey's Conflict of Laws" (6th ed. 1949), "Contracts," Rule 136.

[30] "The Conflict of Laws" (2nd ed. 1952) 64n.

[31] "A Textbook of the English Conflict of Laws" (2nd ed. 1948).

[32] "Private International Law" (2nd ed. 1950).

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Digest of Foreign Law Cases

Special Editor: MARTIN DOMKE

American Foreign Law Association

Aktiengesellschaft der Harlander Baumwollspinnerei und Zwirn-Fabrik v. Lawrence Walker Cotton Co., 228 P. 2d 691 (New Mexico Oct. 4, 1955): shipment to Trieste, Italy (Free Territory) of cotton under Economic Cooperation Administration terms; landed weight at destination; risk of loss after loading but before landing on New Mexican consignor.

Alaska Packers Ass. v. State of California, 136 A.C.A. 657, 289 P. 2d 78 (Cal. App. Oct. 27, 1955): sale of vessel to Yugoslavian Government as export transaction exempt from California sales tax.

Arista Oil Products Corp. v. Dutch-American Mercantile Corp., 135 N.Y.L.J. Jan. 9, 1956, 7 col. 6: delivery of Danish currency (kroner) in Denmark.

Bakshshandeh v. American Cyanamid Co., 286 App. Div. 511, 145 N.Y.S. 2d 292 (1st Dept. Oct. 25, 1955): termination of contract for sales representative in Iran.

Ballentine v. De Sylva, 226 F. 2d 623 (9th Aug. 25, 1955): English law on property inheritance by illegitimate children (p. 629).

Bank of Greece v. Goulandris Brothers, 134 F. Supp. 475 (S.D. N.Y. June 6, 1955): loss in shipment of cheese from Salonica, Greece to New York in 1940.

Benton v. Kennedy-Van Saun Mfg. & Eng. Corp., 145 N.Y.S. 2d 703 (Nov. 7, 1955): contracts with Haitian Government for construction of cement plants in Haiti.

Berner v. United Airlines, 135 N.Y.L.J. Feb. 2, 1956, 1 col. 4: service of process upon Australian airlines, under Warsaw Convention of 1929, U. S. Treaty Series 876; submission of foreign corporations not doing business in N. Y. to jurisdiction of N. Y. courts for causes of action arising out of the state.

Bittson v. Peggy Equities Corp., 134 N.Y.L.J., Nov. 28, 1955, 14 col. 5: effect of custody proceedings pending in Portugal.

Boas v. Machinery Builders, 134 N.Y.L.J. Oct. 27, 1955, 7 col. 2: agreement with German corporation for payment of commission for introduction to American firm.

Brock v. Brock, 134 N.Y.L.J. Dec. 20, 1955, 8 col. 6: effect of Mexican divorce decree on previous separation agreement.

Charia & Co. v. United States, 135 F. Supp. 727 (Customs Ct. Nov. 30, 1954): exclusion of importation of cigar lighters because of unfair practice in import trade.

Choctaw Nation v. United States, 135 F. Supp. 536 (Ct. Cl. Nov. 8, 1955): Treaty with Spain of 1819, 8 Stat. 252, recognizing lands west of 100th meridian as Spanish territory (p. 538).

Christensen v. Sterling Insurance Co., 284 P. 2d 287 (Wash. May 26, 1955): Korean conflict "war" within exclusion clause of life insurance policy.

Costantini v. Costantini, 135 N.Y.L.J. Jan. 12, 1956, 11 col. 8: annulment of marriage performed in Italy.

Crispin Co. v. Lykes Bros. Steamship Co., 134 F. Supp. 704 (S.D. Tex. March 28, 1955): damages to shipment of Belgian burlap on transport from Antwerp to Houston.

Cuba Railroad Co. v. United States, 135 F. Supp. 847 (S.D. N.Y. Nov. 18, 1955): credit for taxes paid to Cuban government.

De Csepel v. First Nat. Bank of New York, 135 N.Y.L.J. Jan. 6, 1956, 7 col. 7: assertion of sovereign immunity of

Hungarian government in discovery procedure.

Delmore v. Brownell, 135 F. Supp. 470 (D. N.J. Sept. 30, 1955): birth certificate issued in Nicosia, Sicily, Italy.

De Sairigne v. Gould, 134 N.Y.L.J. Dec. 12, 1955, 7 col. 7: French law on negotiability of check issued in 1944 in enemy-occupied France drawn upon N. Y. account; no judicial notice of foreign law in view of conflicting affidavits.

Durum, A. G. v. Herlitz, 135 N.Y.L.J. Jan. 4, 1956, 7 col. 2: examination of managers of plaintiff corporation with offices in Switzerland.

Eelhart v. Dulles, 135 F. Supp. 12 (S.D. N.Y. Oct. 20, 1955): Dutch law as to voting in elections for legislative representatives.

Eisler v. Eisler, 134 N.Y.L.J. Dec. 1, 1955, 10 col. 3: annulment of marriage performed in Israel for purpose of facilitating entrance into U. S.

Giannoulias v. Landon, 226 F. 2d 356 (9th Oct. 12, 1955): fraudulent marriage in civil ceremony in Bahamas for purpose of entering U. S.; pre-marital arrangement for later Greek Orthodox ceremony.

Gonzales v. S/S Archangelos, 135 F. Supp. 663 (E.D. Va. Nov. 8, 1955): exception to statute of limitations under Honduran law (flag of vessel) in action by seaman for wages and waiting time.

Greiner v. Freund, 286 App. Div. 996, 144 N.Y.S. 2d 766 (1st Dept. Oct. 11, 1955); no judicial notice of Austrian laws when not properly pleaded.

Grenlich, Petition for Naturalization of Johanna Helen, 117 A. 2d 316 (Hudson County Ct. N.J. Oct. 7, 1955): nullity of Mexican mail-order divorce; reliance by German national on such divorce decree obtained by husband in 1937 and continuance of marriage since 1938 for 17 years, not tantamount to adultery; naturalization granted.

Grey v. American Airlines, 227 F. 2d 282 (2d Nov. 7, 1955): crash of airplane on international flight from New York to Mexico City; application of Warsaw Convention.

Grossman, Matter of Henry, dec'd, 135 N.Y.L.J. Jan. 17, 1956, 11 col. 5: distribution to charitable organization, upon indemnity bond, of funds deposited to credit of legatees in Poland whose whereabouts remain unknown.

A. H. Haeseler Building and Contracting Co. v. The John J. Dupps Co., 129 N.E. 383 (Ohio App. Dec. 28, 1954): commission for services rendered in procuring contracts from Commission of Turkish Government, subject to Foreign Assistance Act of 1948, as amended, 22 U.S.C.A. §1101.

Hamilton National Bank v. Touriansky, 271 S.W. 2d 1 (Tennessee Sept. 6, 1954): no federal prohibition on transfer of private funds to citizen of Soviet Union (p. 6).

Heller v. Heller, 135 N.Y.L.J. Jan. 25, 1956, 9 col. 3: non-recognition of Mexican divorce decree.

Herbert v. Herbert, 147 N.Y.S. 2d 191 (Nov. 21, 1955): effect of Mexican divorce decree and of subsequent Mexican marriage.

Hidalgo County Water Control and Improvement District No. 7 v. Hedrick, 226 F. 2d 1 (5th Nov. 1, 1955): treaty with Mexico of 1945, 59 Stat. 1219, on the use of Rio Grande waters.

Higa v. Transocean Airlines, 24 U. S. Law Week 2293 (9th Dec. 15, 1955): no provision in Hawaiian Code making wrongful death statute applicable to death on high seas beyond territorial waters.

Horowitz v. Forchheimer, 134 N.Y.L.J. Dec. 15, 1955, 7 col. 2: agents of family foundation, revocable trust formed under law of Principality of Liechtenstein; death in Uruguay.

Iida & Co., New York v. Devidayal (Sales), Ltd., 134 N.Y.L.J. Oct. 7, 1955, 7 col. 7; Dec. 14, 1955, 1 col. 6: arbitration of cancellation of contract with Indian seller of manganese-ore; letter of credit by Bank of Tokyo, Bombay branch; customs of Indian ore trade.

Interstate Steel Co. v. Manchester Liners, Ltd., 145 N.Y.S. 2d 754 (Mun. Ct. N.Y. Oct. 24, 1955): damages to shipment loaded in England; jurisdiction in

action between foreign corporations declined in view of crowded docket.

Irvani Mottaghi v. Barkey Importing Co., 134 F. Supp. 719 (S.D. N.Y. Sept. 7, 1955): agreement for sale of Iranian carpet wool executed in Teheran, Iran.

Jones v. Pearce, 277 S.W. 2d 934 (Texas April 20, 1955): attorney's fees for services rendered before Mexican Claims Commissions.

Kirland v. Kirland, 134 N.Y.L.J. Dec. 13, 1955, 7 col. 1: triable issue as to the validity of Mexican divorce decree.

Kohn, Estate of Viktor, 134 N.Y.L.J. Dec. 29, 1955, 5 col. 8: survival of deportation "to the East" in the fall of 1942.

Krabbe's Estate, In re, 145 N.Y.S. 2d 357 (Nov. 1, 1955): no jurisdiction over foreign immovables (lands in Denmark).

Kuehnert, Matter of Paul Albin, 134 N.Y.L.J. Oct. 28, 1955, 16 col. 1: certificate of presumptive death, by West German judicial decree, of absentee who had been captured attempting to escape from Eastern Zone of Germany.

Kupferman v. United States, 227 F. 2d 348 (2d Nov. 7, 1955): damage to cargo of rugs shipped from Persian Gulf to New York.

Kurlan v. Dauray Textiles, 135 N.Y.L.J. Feb. 3, 1956, 8 col. 4: Swedish arbitration law not similar to amended N. Y. Arbitration Statute (sec. 1450 C.P.A.).

Lisi v. Lang, 286 App. Div. 777 (N.Y. 1st Dept. Dec. 20, 1955): insufficient proof of residence in Switzerland, sec. 230 N.Y. C.P.A.

Lockwood, In re L's Will, 147 N.Y.S. 2d 106 (Dec. 19, 1955): will of U. S. citizen executed and probated in Norway; determination of domicile of decedent.

Lorifice v. Lorifice, 135 N.Y.L.J. Jan. 20, 1956, 8 col. 3: effect of fradulent civil marriage performed in Sicily, Italy.

Lullin, Matter of Florence, dec'd, 135 N.Y.L.J. Jan. 31, 1956, 11 col. 4: distributees of Swiss citizen who died in Switzerland; proof of pertinent provisions of Swiss Civil Code.

Lynch v. National Life and Accident Insurance Co., 278 S.W. 2d 32 (Missouri April 19, 1955): Korean conflict "war" within meaning of exclusion clause in life insurance policy.

Mansbendel's Estate, In re, 145 N.Y.S. 2d 807 (Oct. 17, 1955): construction of will as to taxes imposed on income of sister residing in Switzerland.

Matson Navigation Co. v. State Board of Equalization, 289 P. 2d 73 (Cal. App. Oct. 27, 1955): sale of ocean-going passenger vessel to Panamanian corporation, registered as Panamanian vessel, as exportation of ship and therefore exempt from sales tax; U. S. Const. art. I §10 cl. 2.

McCloskey v. Adams, 134 N.Y.L.J. Oct. 25, 1955, 8 col. 1: attachment of funds assigned to P.R.S., Britain's society comparable to ASCAP.

McLinden v. McLinden, 286 App. Div. 1033 (N.Y. 2d Dept., Oct. 24, 1955): approval of separation agreement in valid Mexican divorce action.

Miltenberg & Samton v. Mallor, 147 N.Y.S. 2d 433 (Dec. 19, 1955): guaranty of shipment of canned fish for export and resale in Egypt.

Moreto v. United States, 135 F. Supp. 327 (D. C. Oct. 11, 1955): death while serving with Philippine Army during 1942; Philippine law giving parent right to minor son's earnings not to be invoked under National Service Life Insurance Act of 1940.

Motores de Mexicali, S. A. v. Bank of America National Trust & Savings Assoc., 227 F. 2d 643 (9th June 30, 1955): cash sale of automobiles in Mexico; Mexican title certificates.

Mow v. Republic of China, 225 F. 2d 543 (D. C. June 30, 1955): action of foreign sovereign to prevent sovereign's agents from misusing funds; testimony of Chinese Ambassador.

Namba v. Dulles, 134 F. Supp. 633 (N.D. Cal. Aug. 4, 1955): neither involuntary service of dual national in Japanese Imperial Army in 1943 nor failure to protest conscription amounts to expatriation.

Namkung v. Boyd, 226 F. 2d 385 (9th

Oct. 14, 1955): letter from Korean Consul General concerning deportation of national who feared physical persecution in Korea.

Naso v. Naso, 135 N.Y.L.J. Jan. 23, 1956, 10 col. 5: effect of German divorce decree of previous marriage on annulment action.

Naville, Matter of Robert, dec'd, 135 N.Y.L.J. Jan. 31, 1956, 11 col. 4: distributee of citizen of Switzerland who died in Egypt; sec. 457, 458 and 462 Swiss Civil Code.

Newtown Jackson Co. v. Animashaun, 135 N.Y.L.J. Jan. 3, 1956, 15 col. 1: purchase of lead ore in Nigeria, British West Africa; status of Nigeria Branch of Barclay's Bank in London.

Nesold, Matter of Max, dec'd, 135 N.Y.L.J. Jan. 5, 1956, 11 col. 1: deposit of shares of residents of Russian Zone of Germany (sec. 269, N.Y. Surrogate's Court Act).

Okada v. Dulles, 134 F. Supp. 183 (N.D. Cal. Sept. 16, 1955): conscription into Japanese Army in 1945, of one born of Japanese parents in California in 1915; service not amounting to voluntary expatriation.

Oster, Petition of, 287 P. 2d 859 (Cal. App. Sept. 29, 1955): Convention with Switzerland of Nov. 25, 1850, 11 Stat. 587, does not guarantee right of Swiss nationals to become U. S. citizens; exemption from military service by neutral (Swiss) bars naturalization.

Pavia & Co., S.P.A. v. Siegel Chemical Co., 146 N.Y.S. 2d 656 (App. Div. 1st Dept. Dec. 13, 1955): deposition in action for breach of warranty in sale of waste paper shipped to Italy.

Peka, Inc. v. Kaye, 209 Misc. 1003 (Bronx County, N. Y. Oct. 14, 1955): aviation insurance policy issued in Montreal, Canada, by underwriters Lloyd's of London, Ltd. not removed from operation of sec. 167 (3) N. Y. Insurance Law; submission of British insurer to "jurisdiction of any court within the United States."

Petcheff v. Christo Petcheff, S.A., 286 App. Div. 1099, 145 N.Y.S. 2d 694 (2d Dept. Nov. 14, 1955): employment contract with Bulgarian corporation; equitable ownership of Bulgarian residents in attached bank accounts.

Prevost, Estate of Roger, 135 N.Y.L.J. Jan. 6, 1956, 8 col. 3: expenses for testimony to be taken in France of half-sister of decedent, who is sole heir of their French father.

Rashap v. Brownell, 2d Cir., Docket No. 23797, Jan. 20, 1956: intervention of Aramo-Stiftung, foundation under laws of Principality of Liechtenstein, in action on possessory lien of attorney for reasonable value of services as custodian of property prior to its vesting by Office of Alien Property.

Republica Boliviana v. Doe, 134 N.Y.L.J. Nov. 25, 1955, 7 col. 3: accident insurance policy issued to Bolivian Army Purchasing Commission, an agency of foreign government.

Rosenbaum v. Rosenbaum, 309 N.Y. 371, 130 N.E. 2d 902 (N.Y. Dec. 1, 1955): no injunction to restrain husbands prosecution of divorce action in Mexico; no full faith and credit-consideration to be given to foreign judgments; availability of action for declaratory judgment constitutes adequate legal remedy.

Rugani v. K.L.M. Royal Dutch Airlines, 309 N.Y. 810, 130 N.E. 2d 613 (Oct. 10, 1955): loss of fur skins delivered for transportation to Switzerland; application of Warsaw Convention.

Rusche v. Brownell, D.C. Col., Civil Action No. 2511-52, Dec. 22, 1955: German law on company's managing board of directors and supervisory board; German capital flight tax; residence permits for aliens under Swiss law.

Samad v. The Etivebank, 134 F. Supp. 530 (E.D. Va. Sept. 29, 1955): British law on maritime injuries suffered in New York by Pakistan citizen who had signed in India aboard vessel flying British flag (p. 537).

Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D. N.Y. Nov. 22, 1955): alleged conspiracy, partly performed in Honduras, by company operating dehydration plant in Puerto Cortes,

Honduras, under anti-trust laws in forcing voluntary dissolution.

Saul v. De Koenigsberg, 147 N.Y.S. 2d 396 (Nov. 17, 1955): Argentine law on exportation of art objects; Argentine embargo as impossibility of performance; bona fide effort to obtain permit under Argentine law.

Schroeder Bros. v. M/V Saturnia, 226 F. 2d 147 (2d Sept. 22, 1955): application of Carriage of Goods by Sea Act to damage of cargo of chestnuts shipped from Naples, and Genoa, Italy to New York.

Schumer v. Hamburger & Co.'s Bankierskantoor, N.V., 134 N.Y.L.J. Dec. 27, 1955, 3 col. 7: no enjoinment of action instituted against N. Y. resident in District Court in Amsterdam, Holland; contract of guarantee executed in Holland to be performed pursuant to Dutch law.

Schwarcz v. Commissioner of Internal Revenue, 24 T.C. No. 82 (Tax Court July 22, 1955): war losses in 1942 for property in Hungary owned by Hungarian national, resident of United States.

Scruggs v. Meredith, 134 F. Supp. 868, 135 F. Supp. 376 (D. Hawaii Oct. 19 and Nov. 4, 1955): common law of Anglo-American jurisprudence followed in Hawaii (car accident).

Seaman, Estate of Joseph S., 135 N.Y.L.J. Jan. 26, 1956, 8 col. 1: payment of death duties imposed by British Government; stipulated condition for transfer of N. Y. funds.

Serizawa v. Dulles, 134 F. Supp. 713 (N.D. Cal. July 11, 1955): "involuntary nature of the Japanese elections following the war."

Sharen, Estate of Sidney R., 135 N.Y.L.J. Jan. 26, 1956, 7 col. 7: will providing for legacy to resident of Soviet Union only when transfer possible within one year after death (March 30, 1954); no prohibition against transmission, therefore legatee entitled, but payment directed into City Treasury, pursuant to sec. 269 N. Y. Surrogate's Court Act.

Sieben, Estate of Nathalie, 134 N.Y.L.J. Dec. 29, 1955, 5 col. 8: French law applicable to gift of property located in France to donee residing in France.

Sinai v. Levi, 135 N.Y.L.J. Jan. 10, 1956, 8 col. 2: no judicial notice of sec. 94 of Italian Negotiable Instrument Law (statute of limitations); Italian Criminal Code dealing with crime of conversion.

Soccodato v. Dulles, 226 F. 2d 243 (D.C. Cir. Oct. 4, 1955): involuntary character of service in Italian army and voting in Italian elections by dual national.

Sociedada Brasileira de Intercambio Comercial e Industrial, Ltda. v. S.A. Punta Del Este, 135 F. Supp. 394 (D. N.J. Oct. 13, 1955): admiralty action by Brazilian corporation against Uruguayan shipping corporation and agency of Uruguayan government for damage to cargo consigned to Brazilian corporation.

Societe Internationale pour Participations Industrielles et Commerciales S.A. v. Brownell, 225 F. 2d 532 (D.C. Cir. Sept. 1, 1955): Swiss holding corporation's failure to produce records of Swiss banking concern, in action for recovery of American assets vested as enemy-owned property; constructive seizure in 1950 of records by Swiss Federal Attorney pursuant to art. 273 Swiss Penal Code and art. 47 of Swiss Bank Law; Swedish secrecy laws in British prize cases (p. 541).

State v. De Meo, 24 L. W. 2218 (N.J. Nov. 14, 1955): failure to ascertain legality of mail order-Mexican divorce before remarrying in New Jersey (bigamy prosecution).

Stein Hall & Co. v. Sealand Dock & Terminal Corp., 135 N.Y.L.J. Jan. 3, 1956, 7 col. 5: non-delivery of tapioca flour imported from Itajai, Brazil.

Stephen v. Zivnostenska Banka, 134 N.Y.L.J. Nov. 7, 1955, 8 col. 5: Czechoslovakian bank as nationalized corporation within meaning of sec. 977-b N.Y.C.P.A.; letters rogatory to People's Civil Court of Prague, Czechoslovakia.

Stierhout v. Commissioner of Internal Revenue, 24 T. C. No. 54 (Tax Court

June 24, 1955): bona fide residence in Germany in 1947 in employment with United Nations Relief and Rehabilitation Administration (UNRRA), for income tax purposes.

Swan, Estate of Oei Tjong S. v. Commissioner, 24 T. C. No. 94 (Tax Court Aug. 3, 1955): no recognition of transfer of assets to family foundations established under Swiss and Liechtenstein law in 1939 by citizen and resident of Holland; no vesting of assets located in U. S. in Dutch government-in-exile under its decree of May 24, 1940; market value of guilder for securities located in Holland and subject to Dutch foreign exchange restrictions in 1943.

Terrasi v. South Atlantic Lines, 135 N.Y.L.J. Jan. 13, 1956, 1 col. 1: injury on a trip from New York to Palermo, Sicily; evidence of entries of Italian doctors in hospital journal.

Thomas v. Continental Casualty Co., 225 F. 2d 798 (10th Aug. 6, 1955): air travel insurance policy for passenger with round trip ticket from New Orleans, La. to San Salvador.

Trans World Airlines v. Curtiss-Wright Corp., 134 N.Y.L.J. Dec. 1, 1955, 7 col. 8: damages for crash of airplane in Cairo, Egypt in 1950.

Trans-World Commercial Corp. v. Internat. Cooperative Petroleum Assn., 134 N.Y.L.J. Nov. 1, 1955, 7 col. 6: commission on sales made to National Iranian Oil Company.

Two World Trading Corp. v. Loew's Internat. Corp., 134 N.Y.L.J. Nov. 15, 1955, 7 col. 5: interrogatories to be settled both in the English and Italian languages.

U. S. v. Baker, 24 U. S. Law Week 2282 (S.D. N.Y. Dec. 22, 1955): no prosecution of alien for misrepresentation made in Canada in immigration matter, under False-Statements Statute, 18 U.S.C. 1001.

United States v. Bayer Co., 135 F. Supp. 65 (S.D. N.Y. Oct. 10, 1955): enjoinment of German drug manufacturer's assignee from enforcing assigned right to payments due from U. S. drug company under contract with German firms allocating world markets for aspirin.

United States ex rel. Lee Kum Hoy v. Shaughnessy, 133 F. Supp. 850 (S.D. N.Y. Aug. 8, 1955): certificates issued for Chinese in Hongkong by British government.

United States v. Rayas, 24 U. S. Law Week 2217 (U. S. Ct. Mil. App. Nov. 10, 1955): challenge of qualification of court interpreter at court-martial convened in Japan; accuracy of interpreter's translations.

United States v. Ushi Shiroma, 123 F. Supp. 145 (D. Hawaii, Aug. 12, 1954): native Okinawan not a U. S. national since under Japanese Peace Treaty Japan retained de jure sovereignty over island.

United States v. Watchmakers of Switzerland Information Center, 134 F. Supp. 710 (S.D. N.Y. Sept. 15, 1955): alleged violation of anti-trust and tariff laws by Swiss corporation; jurisdiction by reason of affiliation with wholly-owned N. Y. corporation; Collective Convention of Swiss corporation in restraint of trade.

Vincze, Estate of Erno, 134 N.Y.L.J. Dec. 16, 1955, 6 col. 4: non-participation of Hungarian Government in discovery proceedings.

Viselli v. Martino, 285 App. Div. 1195, 140 N.Y.S. 2d 643 (3rd Dept. May 11, 1955): "less favorable treatment" to non-resident Italian dependent under art. 17 N. Y. Workmen's Compensation Law violative of art. XII (1) of the Commercial Treaty with Italy, of July 26, 1949, 63 Stat. 2272.

Wencak v. United Nations, 135 N.Y.L.J. Jan. 19, 1956, 6 col. 7: United Nations not successor to U. N. Relief and Rehabilitation Administration (UNRRA).

Whitaker v. Commissioner of Internal Revenue, 24 T. C. No. 86 (Tax Court, July 25, 1955): employment in 1952 at Thule, Greenland; non-deductibility of expenses.

Wong Man Gin v. Dulles, 131 F. Supp. 549 (D. Mass. May 20, 1955): validity

of marriage performed in China with usual ceremonies.

Zaruski, Matter of Miriam Feigl, dec'd, 134 N.Y.L.J. Nov. 1, 1955, 11 col. 7: presumed death as victim of a "populicide perpetrated on July 15, 1941," on the residents of a village in Province of Lomza, Poland.

Zwack v. Kraus Bros. & Co., 133 F. Supp. 929 (S.D. N.Y. July 29, 1955): partner's action on behalf of nationalized Hungarian partnership against distributing agent, under Hungarian Commercial Code of 1875; immunity from judicial review (Act of State doctrine) not applicable to extra-territorial effect of Hungarian confiscation decrees; French Carthusian Monks cases re trademark "Chartreuse" (p. 934).

Book Reviews

MILLIOT, L. *Introduction à l'étude du droit musulman.* Institut de Droit Comparé de l'Université de Paris. Les systèmes de droit contemporain, II. Paris: Recueil Sirey, 1953. Pp. xii, 822.

More than thirty-five years ago, Louis Milliot discovered and explained the part played by judicial practice in Muhammadan law as applied in Morocco. It was an important contribution to Islamic legal studies, and entitled its author to be regarded as one of the foremost authorities in this field. We owe to him, in addition, valuable studies on the position of women, on agricultural contracts, on certain aspects of *waqf*, and on joint property in land in the Maghreb. It was therefore to be expected that the present imposing volume, containing "une vision ordonnée de tout ce que je sais" (p. xi), would be worthy of the subject and of Louis Milliot. Unfortunately, it is disappointing in many respects.

The work consists of the following chapters: *Introductory Chapter:* Islam and legal thought. The study of Islamic law in Europe. *Chapter I:* The concept of state in Islam. *Chapter II:* The legal system. (i) The primary sources of law (Koran and *sunna*). (ii) The secondary or rational sources of law (consensus and reasoning by analogy). (iii) The spontaneous sources: custom (*'urf*) and judicial practice (*'amal*). (iv) Administrative regulations (*qānūn*) and law. *Chapter III:* Legal science and Islam. (i) The fundamental concepts of Islamic law. (ii) The development of the Islamic legal system. (iii) The main institutions of Islamic law. *Chapter IV:* The law of family. (i) Marriage and concubinage (in fact, marriage alone is treated): conclusion, effects, and dissolution of marriage. (ii) Filial relation; rights and duties of parents and children. (iii) Guardianship of minors and of the insane; incapacity of the bankrupt. (iv) Inheritance. *Chapter V:* The law of property. (i) Land subject to *kharāj* or tribute. (ii) *Waqf* or mortmain. (iii) Ownership; joint ownership; rights *in re;* proof of ownership; contracts (including, under charitable contracts, the testament). *Chapter VI:* Administration of justice (including penal law and civil and delictual responsibility). *Chapter VII:* Islamic law and Western influences. There follow an index of Arabic authors and titles, a glossary of technical terms, a bibliography, and a general index of subjects.

Professor Milliot tells us (p. ix) that the book, as originally conceived, was to end with chapter III, and that he has added a detailed treatment of the main institutions of Islamic law (chapters IV–VI) at the suggestion of his publisher. It is convenient to consider first the introductory chapter and chapters I–III together with chapter VII, which belongs to them naturally. The greater part of these pages had already been printed: the second section of the introductory chapter (pp. 23–31) in the *Revue juridique et politique de l'Union française*, 1947, chapters I and II (pp. 32–96, 97–180) in the *Recueil des cours de l'Académie de droit international de la Haye*, 1949, and the first section of

chapter III (pp. 186–198) in the *Travaux de la semaine internationale de droit musulman 1951*, Paris 1953.

The five chapters in question contain the essential subject matters with which an introduction to the study of Muhammadan law can be expected to deal. There are, in the first place, the traditional methodology and the fundamental ideas of Islamic law, the subject of the discipline of *uṣūl al-fiqh*. Milliot gives a detailed and in many respects excellent survey of this field in parts of chapters II and III. (It would have increased the usefulness of the work as an introduction, if references to some authoritative treatises of *uṣūl* had been added.) Nothing similar has so far been available in French, and the book will be consulted with profit by English and American readers, too, who so far have been able to refer to the books of Abdur Rahim (*Principles of Muhammadan Jurisprudence*, Tagore Law Lectures 1907) and Aghnides (introduction to *Mohammedan Theories of Finance*, Columbia University, 1916). Milliot completes this by a thorough treatment of the part played by custom and judicial practice in Islamic law, particularly in North Africa; here he speaks from first-hand experience. One might, perhaps, criticise the fact that he mentions these two "spontaneous" sources of law at the same level as the four "official" ones; this is justifiable neither from the Western historical nor from the Muslim systematic point of view, and the nonspecialist reader must indeed often be uncertain whether the author speaks as a Western critical student or merely expounds the traditional doctrine of the Muslim scholars. Excellent on the whole, too, is what he has to say on the concept of law in Islam (pp. 186 ff.), but concerning the nature of Muhammadan law from the comparative point of view or, what amounts to the same thing, from the point of view of legal sociology, his occasional remarks, though correct enough as far as they go, do not go deep enough; the reader is never told clearly that Islamic religious law is the result of the imposition of nonlegal, ethical, religious norms on a legal subject matter which had originally lain outside religion. Milliot also fails to do justice to the fundamental problem of the relationship between theory and practice in Islamic law; he records well some important aspects of this relationship, his treatment of custom and judicial practice in North Africa is a case in point, but he fails to make the essence of this relationship intelligible to a reader who is in need of an introduction to the study of Islamic law. The same failure makes his treatment of the function of administrative regulations (*qānūn*) utterly inadequate. What he says on the concept of state in Islam is of unequal value; his remarks on the historical origin and the classical theory of the Islamic state are perfunctory and contain several factual errors, but those on the political organisation of North Africa in the Middle Ages and on the political aspirations of the Islamic Near East at the present time ought to be of interest to the general reader. On this subject we now possess the works of E. Tyan, *Institutions du droit public musulman*, I, Paris 1953, and of L. Gardet, *La cité musulmane*, Paris 1954.

Secondly, an introduction to the study of Islamic law can be expected to

give the reader an adequate and correct account of its ancient history and modern developments, and of the development of Western studies in this field. Professor Milliot treats indeed of all these subjects at some length, but what he has to say on them is inadequate, out-of-date, and misleading. Our ideas concerning the ancient history of Islamic law have undergone a thorough change recently, and the only works by European scholars to which he refers at the beginning of the relevant section, are in fact two publications of 1950 which set out the new and by now generally accepted point of view (a paper by R. Brunschvig in *Al Andalus*, vol. xv, and my own *Origins of Muhammadan Jurisprudence*). But his text shows no trace of the present stand of our knowledge, it is thoroughly antiquated and would have been out of date, to name an arbitrary epoch, as far back as 1870 when Sachau's paper *Zur ältesten Geschichte des Muhammedanischen Rechts* appeared. Either he has not taken cognizance of the publications to which he refers, or he does not agree with their conclusions; but then he ought not to have made it appear as if they supported his obsolete views.

An account of modern developments in Islamic law under Western influence is an indispensable part of an introduction to its study. Being a modern lawyer by formation and having taken part, as a magistrate, in applying Muhammadan law to modern conditions, Professor Milliot is eminently qualified for treating this subject. Excellent, indeed, is his final summing-up (pp. 780 ff.), in which he sees the task of contemporary Islamic jurisprudence as the Islamicizing of Western elements, comparable to the integration of foreign elements in the early period of Islamic law. His detailed account of legal modernism, however, is incomplete and superficial. He does not distinguish those fields of law which have always been withdrawn from the effective action of Islamic religious law and in which the introduction of codes derived from Western models is of no particular systematic interest, from those other fields in which Islamic religious law has always been applied in practice but is now being modified by legislative interference inspired by Western thought, which is an important new departure; he does not even mention this unprecedented phenomenon in the history of Islamic law, which nevertheless was analyzed in detail as far back as 1932, and he does not do justice to a third tendency, which aims at elaborating a new unitary system of law based on the fundamental legal concepts of traditional Islamic law. Finally, his account of Western studies on Islamic law is a caricature of the facts, and the way he speaks of Goldziher and Snouck Hurgronje, the two great masters on whose work all modern research is based, can only reflect upon the author.

I come now to chapters IV–VI (pp. 268–769). Professor G.-H. Bousquet has stated, in a review of Milliot's work (*Revue Algérienne*, year 1953, part i, pp. 223–228), that the greater part of this section of the book reproduces, without acknowledgment, the mimeographed course of lectures on Islamic law by the late Professor Morand of Algiers; I therefore had no choice but to compare both texts myself, and I have used a copy of Morand's lectures signed

by him. I have come to the conclusion that Milliot's pages 284–618 contain an abbreviated and improved, but nevertheless substantially and to a great extent even literally identical version of the corresponding pages in Morand, with a number of additions by Milliot. The following examples will be sufficient to show the degree of his dependence on Morand.

Morand, p. 114

La femme peut, le cas échéant, être obligée de vaquer elle-même aux soins du ménage. Le mari doit fournir à la femme des domestiques, si la fortune du mari le permet et si la condition des époux l'exige. (Khalil). Mais, si la situation de fortune des époux l'exige, la femme doit pouvoir être obligée de vaquer aux soins du ménage; cette obligation constitue pour la femme la compensation de la charge incombant au mari de solder seul les frais du ménage.

Milliot, p. 341

La femme peut, le cas échéant, être obligée à vaquer elle-même aux soins du ménage. Le mari doit fournir à la femme des domestiques, "si sa fortune le permet et si la condition des époux l'exige", dit Khalil. Au cas contraire, la femme doit vaquer aux soins du ménage; c'est la compensation de la charge incombant au mari de solder seul les frais du ménage.

Morand, p. 237

Dans le rite malékite, il n'apparaît pas que la constitution de habous soit soumis [sic] à des formes particulières déterminées. Il est admis en effet dans ce rite que la constitution de habous peut très bien résulter d'une déclaration verbale du constituant en présence de témoins, et pour cette déclaration verbale, il n'est pas de termes consacrés; elle peut être conçue en termes quelconques, mais il est indispensable que des termes employés résulte l'intention certaine, indiscutable du constituant de frapper de séquestre les biens habousés. Ce n'est qu'autant que cette intention est certaine que l'acte vaut comme constitution de habous. S'il en était autrement, l'acte ne vaudrait que comme donation aumônière.

Milliot, p. 548

Dans le droit malékite il n'apparaît pas que la constitution de habous soit soumise à des formes particulières. Il est admis en effet, dans ce rite, qu'elle peut résulter d'une déclaration verbale, en présence de témoins. Il n'y a pas de termes consacrés; mais il est indispensable que, des termes employés, il résulte une intention certaine du constituant. Ce n'est qu'autant que cette intention est indiscutable que l'acte vaut comme constitution de habous. S'il en était autrement, l'acte ne vaudrait que comme donation aumônière.

Morand, p. 268

Le droit de propriété, en droit musulman comme en droit français, c'est le droit d'user, de jouir, de percevoir des fruits et de disposer, c.à d. le droit d'aliéner, voire même de détruire le bien qui fait l'objet de ce droit de propriété. De là, il résulte qu'en droit musulman comme en droit français, le droit de propriété, c'est en somme le droit le plus complet, le plus absolu que l'on puisse avoir sur une chose.

Mais cependant ce droit comporte certaines limites. C'est ainsi que le droit de

Milliot, p. 578 f.

Le droit de propriété, en droit musulman comme en droit français, comporte pour le propriétaire le droit d'user, de jouir, et de disposer de la chose comme il lui plaît. Il est le droit le plus complet, le plus absolu que l'on puisse avoir sur une chose.

Ce droit comporte néanmoins des limites. C'est ainsi qu'il ne peut s'exercer qu'à

propriété ne peut s'exercer qu'à la condition de ne violer aucune disposition de la loi.—De même encore, le droit de propriété ne peut s'exercer qu'à la condition de ne pas léser le droit d'un tiers. Le droit de propriété a pour limite le droit des tiers. La Medjellat (art. 1192) le dit dans les termes suivants: "[quotation]."

Enfin, le propriétaire ne saurait se prévaloir de son droit de propriété, alors même qu'il ne porterait pas atteinte aux droits d'un tiers, si l'exercice de ce droit avait pour conséquence de causer à un tiers, et cela sans motif légitime, sans intérêt défendable, un préjudice sérieux: "[quotation]" dit l'art. 1197 de la Medjellat.—Et le jurisconsulte Naouaoui dit: "[quotation]." De là, il résulte manifestement que la loi musulmane connaît comme la loi française l'abus du droit.

la condition de respecter les charges imposées par la Communauté dans la mesure prescrite par la loi. De même, le droit de propriété ne peut léser les droits des tiers. La *Madjallat* (art. 1192) dit: "[quotation]."

Enfin le propriétaire, alors même qu'il ne porterait aucune atteinte aux droits d'un tiers, ne saurait se prévaloir de son droit de propriété, si son exercice avait pour conséquence de causer à ce tiers, sans motif légitime ni intérêt défendable, un préjudice sérieux. "[quotation]", dit l'article 1196 [read: 1197] de la *Madjallat*. Et le jurisconsulte al-Nawāwī: "[quotation]." C'est la prohibition du préjudice excessif. . . . Le principe que nul ne doit abuser de son droit, de caractère plus moral que juridique, a atteint dans le droit musulman un développement considérable, qu'explique le caractère religieux du système législatif islamique (cf. Mahmoud Fathy, *La théorie* [read: *doctrine*] *musulmane de l'abus des droits*, Paris-Lyon, 1913).

Morand, p. 272

A une autre extrémité du monde musulman, les choses se passent de la même manière. C'est ce qu'ont constaté les Père [sic] Jansen et Salignac au cours d'une mission qui leur avait été confiée et dont ils ont publié le compte-rendu. A la page 459 du libre [sic] traitant du régime des eaux à Mahad, on lit: "[quotation]." L'eau par conséquent constitue ici une appropriation distincte de celle du sol.

Milliot, p. 583

En Arabie les choses se passent de la même manière, selon les PP. Jaussen et Salignac: "[quotation]." L'eau, ici encore, constitue une appropriation distincte de celle du sol. (*Le régime des eaux à Mahad*, p. 459.)

In this last passage, Milliot has corrected the name of Père Jaussen, but has conserved the typing mistake in the name of Père Savignac. Out of Morand's confused reference, he has created a nonexistent book; the passage quoted occurs on p. 459 of *Mission archéologique en Arabie*, vol. i, Paris 1909, and the authors speak there not of Mahad, which is another typing mistake in Morand's lectures, but of Ma'ān.

It is, of course, obvious that the subject matter of Islamic law must lead to certain coincidences between any two authors, particularly in elementary definitions and enumerations of categories, and no one will blame Professor Milliot if he took over and gradually improved and added to the course of lectures of his predecessor at the University of Algiers. The dependence of his

text on that of Morand is, however, incomparably more specific than that on the work of any other author, for instance on the *Istituzioni di diritto musulmano malichita* of D. Santillana (2 vols., Rome 1926 (2nd ed. 1938), 1943), another modern lawyer from North Africa, and the reader of a book published as his own work has the right to expect a more specific acknowledgement than his general expression of indebtedness to the previous workers in this field (p. x). But this is not the most important issue; I do not suggest that Professor Milliot could not have given an original account of the main institutions of Islamic law by himself, and he has done so, in fact, in those pages of chapters IV–VI which are not dependent upon Morand. It is, rather, his carelessness in drawing upon Morand, of which I have just given an example, and his undue reliance on him. Morand's sources for the doctrine of the Ḥanafī school are two nineteenth century works, the Ottoman *Mejelle* and the *Code Égyptien du Statut Personnel;* these are, too, Milliot's sources for the Ḥanafī doctrine in this section of the book, to the exclusion of the authoritative Ḥanafī authors, who are nevertheless known to him. As regards the Mālikī authors, too, he ought not to have restricted himself to Khalīl's *Mukhtaṣar*, with occasional quotations from Ibn 'Arafa and Ibn 'Āṣim, but to have turned consistently to the great commentaries on Khalīl. His choice of subject matter in chapters IV–VI is identical with that of Morand in his lectures. But if the Islamic concept of state (in chapter I) and Islamic penal law (in chapter VI) were to be included in the book, the law of slavery, of holy war, and the treatment of tolerated religions, all of which are typical of Islamic public law, deserved to be treated as well.

The most important of Professor Milliot's original contributions in chapters IV–VI are his disquisitions on the juridical nature of the contract of marriage (pp. 268–284), on the nullity of marriage (pp. 312–320), on land law in Morocco (pp. 498–525), on the encroachments on *waqf* property (pp. 564–573), on possession and ownership in Islamic law (pp. 602–606), on the proof of ownership (pp. 618–637, reprinted from the *Travaux*), on contracts, including legacies (pp. 638–682), and the whole of chapter VI on the administration of justice. The historical parts in the first, third, and last of these items are weak. Concerning the juridical nature of the contract of marriage, Milliot enters into a long polemic against Morand, who had equated the Islamic contract of marriage with a contract of sale. He goes to the other extreme by underestimating the synallagmatic elements in the Islamic contract of marriage and the opinions of the Muslim lawyers; a balanced judgment can be found in Santillana (I^2, pp. 196 ff., especially 215 f.). Reproducing an unfortunate reasoning of Morand (p. 58), he alleges (p. 285 f.) that under a system of pure agnatic relationship the grandfather would be barred from marrying his son's daughter, but not necessarily his daughter's daughter, and that only the Muslim lawyers extended the prohibition to the daughter's daughter. In support of this surprising assertion, he quotes Koran iv, 27, which he translates: "Do not marry the daughters of the sons whom you have procreated." But this is wrongly

translated, the Koran says: "Forbidden to you are ... the *spouses* of your sons who have sprung from your loins," and the Muslim lawyers find the prohibition of all female descendants implied, no doubt correctly, in the mention of "daughters" among the prohibited degrees earlier in the same verse. The section on consent in marriage (pp. 295–301) is badly organized. It starts from the French and, indeed, general Western idea that the consent of the future husband and wife is a necessary condition for the valid conclusion of a contract of marriage, and at once goes on to discussing the, to a Western lawyer surprising, provision of Islamic law that a minor, under certain conditions, can be married without his or her consent and even against his or her will by the father, the next of kin, or even the guardian appointed by the father in his will, with differences between the several schools of law on the details. But this throws the whole juridical construction of the contract of marriage in Islamic law out of focus. In Islamic law, the co-operation of the *walī* or "guardian for the purpose of marriage" of the bride (I will not speak of the bridegroom here) is considered an essential element of the contract, every woman has a *walī* who in the last resort is the cadi, it is the *walī* who on behalf of the bride exchanges with the bridegroom or his legal representative the declarations of offer and acceptance which constitute the prescribed form of a contract. The consent of the bride, whenever it is necessary, is therefore regarded not as part of the form of the contract, as Milliot (p. 307) mistakenly treats it, but as part of its subject matter. He fails to make clear this all-important function of the *walī*, and mentions it only incidentally (p. 308). There are two exceptions to the general rule concerning the *walī* which I have just quoted. According to the Ḥanafī school, a woman who is of age may herself conclude a contract of marriage; Milliot refers to this (p. 308), but he does not mention that the *walī* in this case retains the right of opposing the marriage if it does not fulfil certain conditions. And according to Mālik himself, a woman of lowly condition may dispense with a *walī*; this doctrine, it is true, does not seem to have left traces in the later Mālikī doctrine, and Milliot does not mention it. He also does not mention the corollary to the considerable extension which the Ḥanafī school has given to the group of persons who, acting as *walī*, can give a girl in marriage without her consent, I mean, her right to have the marriage dissolved on reaching majority.

It is in technical systematic analysis and in his treatment of problems of positive law peculiar to Morocco that Professor Milliot shows himself at his best. To the first category belong his discussion of the nullity of marriage (it would be interesting to complete this by an historical study on the development of the categories *fāsid* and *bā.il* in the several schools of Islamic law), of possession and ownership, and of the proof of ownership; these sections constitute no doubt positive additions to our knowledge. I was particularly impressed, too, by his demonstration that the legacy in Islamic law is a charitable contract, of the same nature as the donation (pp. 676–682). But the rest of the section on contracts is perfunctory; one misses, for example, even the mention

of important institutions such as deposit (*wadī'a*), loan (*'āriya*), and surety (*ḥamāla* or *kafāla*). It is true that the sale (*bay'*) is the model on which other commutative contracts are construed in Islamic law (p. 649); but whereas Milliot minimized this well-known fact when he spoke of the juridical nature of the contract of marriage, he now extends its scope beyond measure by subsuming under *bay'* not only barter (*muqāyaḍa* or *mubādala*) and exchange (*ṣarf*), which belong there, but also *salam*, a sale with immediate payment and deferred delivery, *istiṣnā'*, the contract to manufacture an object with immediate payment (p. 650 f.), and even, by implication, *ijāra* and *kirā'*, rent and hire, or better, *locatio conductio operarum* and *l.c. rei* (p. 640). This is positively wrong, for although these contracts are construed on the model of *bay'*, they are not contracts of sale but legal institutions in their own right, because they would be unlawful under the rules governing sale. A real systematic analysis of the contract of *ijāra*, for instance, would have led him to a more adequate appreciation of the "legislative method" of the early specialists who elaborated the religious law of Islam, than appears from his concluding paragraph on contracts (p. 682) which amounts to nothing more than the statement of the fact, true and important enough in itself, that their decisions, originally based on individual reasoning, received the sanction of consensus.

Original and valuable, too, are Professor Milliot's contributions on land law in Morocco (pp. 502–525) and on encroachments on *waqf* property in the same country, both subjects which he has studied in previous publications of his own. But as regards the sections on land law in Algeria (pp. 525–530) and in Tunisia (pp. 530–531), he is again dependent on Morand (for Algeria, on Morand's course of lectures on Algerian legislation, for Tunisia, on Morand's course of lectures on Islamic law). Chapter VI on the administration of justice contains some extraneous matter (particularly pp. 703–712), and it is badly organized; the legal proofs, for instance, are discussed first in a special section (pp. 731–743), and then again as part of criminal procedure (pp. 751–756), though the greater part of the details given in this last place are applicable to civil procedure as well. The inclusion of the so-called *shahādat lafīf*, however, a development peculiar to Morocco in which the quantity of witnesses supplies their lacking quality, is welcome (p. 737). The whole treatment of penal law is very superficial. Concerning one important aspect of it, the interplay of private vengeance and public repression of murder, Professor Milliot merely remarks that a discretionary punishment by the cadi can take place if the victim or his next of kin have renounced retaliation (p. 762). He does not mention that, according to Mālikī doctrine, (1) retaliation, i.e. capital punishment, *must* take place if the murder was committed with *ghīla*, i.e. for the purpose of robbery, (2) that the so-called *'uqūba*, a punishment by one hundred strokes and imprisonment for one year, *must* take place, beside any payment of weregeld if, in a case of murder, retaliation is renounced or cannot be carried out for some reason or other. His remark on the general tendencies of Islamic penal law (p. 763) is unsatisfactory, too. It is unjustified to regard the acts

threatened with discretionary punishment as "political offences;" the only "political offence" in Islamic law is the crime of revolt (*muḥāraba*), which he does not discuss. And as regards the two other classes of crimes, crimes against religion and crimes against human persons (to call them "crimes of common law" is misleading), I find, instead of a general tendency to severity, an outspoken tendency to leniency in the first, and to strictness, the same as in the law of property, in the second, with the proviso that these tendencies operate at the preliminary stage of legal proof, and are reversed at the final stage of execution. This, too, can lead to important conclusions on the process of formation of Islamic religious law.

I shall not attempt to correct errors of detail, but cannot pass in silence a number of elementary mistakes in Arabic, not to speak of the numerous faults (not only inconsistencies) in transliteration, which go far beyond what can be dismissed as misprints. I have already pointed out a grave error in the translation of a passage from the Koran. Another example occurs on p. 641, where we read that declarations can be either explicit "(*ṣuraḥā'*)" or allusive (*kināya*). The term *kināya* is correct, but the term *ṣuraḥā'* cannot possibly be used of words, declarations, or the like; it denotes exclusively the genuine, full members of a tribe; the correct term is *ṣarīḥ, ṣarīḥa*. And it is nothing less than shocking to find the contract of manufacture, *istiṣnā'*, consistently confused with the "exception," *istiṯnā'*, several times in the text and in the glossary of technical terms; the two roots have only the one letter *n* in common. There are mistakes, too, in Milliot's French rendering of Arabic technical terms, e.g. on p. 264, where the terminology is hopelessly confused. The glossary of technical terms, with short explanations, is somewhat better in this respect, and references to the passage to which I have just referred, have been wisely omitted from it.

Professor Milliot's book is not without its value, and the student who has already sound ideas on Islamic law, will consult parts of it with profit; but it is unsuitable as an introduction to the study of Islamic law. In conclusion, I cannot refrain from pointing out that the standard of French scholarship in this field cannot be measured by the work reviewed here.

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LAGERGREN, G. *Delivery of the Goods and Transfer of Property and Risk in the Law on Sale.* Vol. V, Publications of the Institutet för Rättsvetenskaplig Forskning (Institute for Scientific Legal Research). Stockholm: P. A. Norstedt & Söners Förlag, 1954. Pp. 151.

The author of this book, an associate judge of the Court of Appeal at Stockholm and a member of the International Court at Tangier, undertakes to describe the rules of law that determine the transfer of possession, property, and risk under Anglo-American, French, German, and Scandinavian law. If any author can be considered well-equipped for his task, it is he; apart from

his remarkable linguistic abilities which permitted him to write this book in English, he has also contributed both theoretically and practically to the unification of European commercial law. He knows the difficulties which prevent this unification from materializing; consequently, the book is designed to explain them and thereby to contribute to their elimination.

The book is divided into three parts which deal with delivery, transfer of property, and passing of risk respectively. Each part is subdivided into chapters where the reader is informed about the law in the countries listed above. The author is fully familiar not only with the statutory law and the leading cases of each legal system but also with the intricacies of legal theory. As a result, the book has become a bonanza of information to anybody who wishes to know what the law is.

This bonanza is not easily accessible. At times the author is inclined to express himself in terms of his own making, especially where he attempts to explain the abstract reasoning of German legal theorists; the reader, when struggling with some cryptic statement, will grasp its meaning if he tries to retranslate it into German. The reviewer is perfectly aware of the difficulties that the author encountered in this respect; they could have been avoided only by having the manuscript examined by persons whose native tongue is English and who are not conversant with any other language. It seems also that the author expects his readers to have a reading knowledge of both French and German. As a consequence, the book abounds in quotations which are printed in italics, without quotation marks, and inserted into the English statements of the author. The result is a strange-looking literary concoction. Examples: "This has had its counterpart in the demand for *einer endgültigen sinnfälligen Inbeziehungsetzung* . . ." (p. 140). "The declaration . . . is said to *rend le marché ferme*" (p. 27). "The goods are *dû être livrée*" (p. 87). But even where the rules of grammar remain inviolate, such transplantations can be dispensed with. In the medical field, it would be equally difficult to affix foreign scalps to Anglo-Saxon skulls.

The author proposes to describe the law of sale as it now is, without exploring the historical background. As a consequence, his occasional references to Roman and medieval English law somehow strike the reader as foreign bodies, often too terse to be informative. As for the modern law, a reader who is unfamiliar with the problems will have difficulty in finding his way through the numerous court decisions and opinions of legal writers that the author presents. The emphasis placed on certain items, the headlines of the subparagraphs and the way these have been grouped and connected with each other make it difficult at times to grasp the *Leitmotiv* behind the imposing array. The reason probably is that the book originated at the time when the draft of a Uniform Law on International Sales of Goods was under consideration on an international level. In fact, most of the questions to which the author's attention was chiefly drawn have been bones of contention at the successive conferences.

The connection between the book and the Rome Draft is particularly obvious as far as the chapter on delivery is concerned. The Rome Draft was based on two propositions: (1) The seller is primarily bound to bring about what the Draft termed "*délivrance*," a unilateral act which constitutes a replica of the "*avlämna*" of the Scandinavian Sale of Goods Act and has nothing whatever to do with the "*délivrance*" of the French Civil Code. (2) The risk passes to the buyer as soon as the act of "*délivrance*" has been carried out. It seems by now that the practical value of the Scandinavian construction has been overrated,[1] and the author is not too enthusiastic about its adoption (pp. 43 *et seq.*). In addition, even the draft contained a provision under which the seller was obliged to transfer property and possession to the buyer; this was evidently done in order to satisfy the requirements of German law under which the seller undertakes not only to deliver but also to transfer the title to the goods sold. In the meantime, the words referring to transfer of possession have been eliminated.[2]

In the chapters on property and risk, the author seems to have created an impasse from which he was unable to emerge. He was of course aware of the fact that, on the one hand, the "*res perit domino*" rule links the passing of risk with the transfer of title, and that, on the other hand, the passing of risk is all that matters in the majority of commercial dealings. Thus, when discussing the details of Anglo-American law in this field, he could either conform to its traditional structure and discuss such topics as "deliverable state" and "appropriation" in the chapter on transfer of property, or examine the rules from the viewpoint of a trader, i.e. regard everything including transfer of title as prerequisite to the passing of risk.[3] What he could not do, in the reviewer's opinion, was to write two separate chapters on "property" and "transfer of risk" and to distribute the various subjects to both. As a result, the unpaid seller's lien and the trust receipt are dealt with in the chapter on risk.

The author apparently did not intend to discuss all the questions connected with the *pactum reservati dominii* (conditional sale). He did not have to since there are a good many monographs on that subject.[4] Still, it might have been

[1] *Cf.* art. 17, Rome Draft, as re-edited in 1954 by the Dutch Ministry of Justice: "Le vendeur s'oblige à délivrer à l'acheteur conformément au contrat, la chose et ses accessoires. La délivrance consiste dans la remise d'une chose conforme au contrat." Hence, "délivrance" in the meaning of the Draft must now be understood as a bilateral act. The former provision was modelled after the Scandinavian law referred to in the text.

[2] See art. 52 of the former, art. 58 of the present version.

[3] For the first alternative, see Graue, Die Fahrnisübereignung durch Kauf im englischen und nordamerikanischen Recht, Munich 1949; the second is preferred by several English authors.

[4] Stulz, Der Eigentumsvorbehalt im in-und ausländischen Recht, Berlin 1930; Blomeyer, Studien zur Bedingungslehre, Berlin 1938/39; Graue, Der Eigentumsvorbehalt im ausländischen Recht, Frankfurt 1953; Der Eigentumsvorbehalt im deutschen Recht, Frankfurt 1954; Hamel(-Friedel), La vente commerciale de marchandises, Paris 1951, pp. 117 ff.; Féblot-Mezger, Eigentumsvorbehalt und Rücktrittsklausel bei Lieferungen nach Frankreich, 20 Zeitschrift für ausländisches und internationales Privatrecht 662 ff. (1955).

appropriate to inform the European reader about the relationship between the Uniform Conditional Sales Act and the conditional sales acts of the several states, both of which are mentioned rather cursorily (p. 77). Speaking of delivery of goods sold under a *pactum reservati dominii* (p. 38), the author rightly refers to the discussion in the current German legal literature with respect to the question whether delivery without transfer of title is in itself a performance of the contract. The question had been answered in the negative by the former Reichsgericht because the law unequivocally prescribes both delivery and transfer of title. However, the currency reform legislation of 1948 under which money debts resulting from contracts of sale were converted into Deutsche Mark in a proportion of 1:1 if the contract had not yet been performed on June 20, 1948,[5] gave fresh impetus to the opinion that, once the conditional seller delivers the thing sold, the contract must be regarded as performed; the buyer acquires a conditional title and the transformation of the same into a title absolute no longer depends upon the will or the acts of the buyer but only upon the fulfilment or nonfulfilment of the condition. Now the consequences of this opinion would reach far beyond the prevention of inequities under the conversion laws. If the conditional buyer becomes a bankrupt, the trustee in bankruptcy (*Konkursverwalter*) is free to elect either full mutual performance or nonperformance. The exercise of this right, however, is based on the traditional view that the conditional seller has not performed his obligation to transfer the title unless and until the conditional title of the buyer develops into a full title. If this view is discarded, the trustee will be unable to elect performance and the seller can demand only that the goods sold be restored to him on the ground of the *pactum reservati dominii;* his claims under the contract of sale as such will be limited to damages, and in this respect his position is the same as that of any other creditor, i.e. the amount of his claim will be reduced accordingly. The same applies *mutatis mutandis* to judicial liquidations (*Vergleichsverfahren*).[6] The discussion has now gradually subsided, but it seems that in the long run the view taken by the Reichsgericht will prevail, the more so because the effects of the currency reform legislation have lost much of their original importance.

A few more remarks might have been made about sales of future goods (*ventes de choses futures ou à fabriquer*, *Werklieferungsverträge*). The book contains some passing references to the shipbuilding contracts and to French legal theory on this point (pp. 90, 94), but the subject would certainly warrant more detailed treatment.[7]

The headline "seller has to pay the cost of transportation" (i.e. under German law) (p. 97) is misleading. Under German law, the costs of weighing and measuring, in short all costs connected with delivery are defrayed by the

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[5] See sec. 18 subs. 1 no. 2, Conversion of Debts Act (Umstellungsgesetz).

[6] *Cf.* Landgericht (District Court) München, Betriebs-Berater 1954, p. 73; *contra*: Ohr, Betriebs-Berater 1954, p. 334.

[7] See Graue, Fahrnisübereignung etc., pp. 66 ff.

seller, those of transportation by the buyer.[8] The provision quoted by the author[9] is only designed to prevent misunderstandings about the *locus solutionis*, in case the seller undertakes to bear the transportation costs by express stipulation or by insertion of the f.o.b. or c.i.f. clause; in other words, such an agreement on the costs will not affect the *locus solutionis*.

The Incoterms of 1936 to which the author occasionally refers were rephrased in 1953; the author himself took a leading part in this meritorious work. Unfortunately, two of the clauses—"free . . . (named port of shipment)" and "free or free delivered . . . (named point of destination)"—had to be eliminated and there are many other clauses, such as "free frontier" (*franco frontière*), which have until now defied regulation.[10] The chief problem in most of these cases is whether the clause in question should determine the risk as well as costs. German traders are generally inclined to answer in the negative, and the author correctly points out that even in the case of the f.o.b. clause the Reichsgericht shared this reluctance until 1923.

In the opinion of the reviewer, it is one of the most striking phenomena of modern sales law that the various legal systems, while starting out from fundamentally different theories, are increasingly approaching each other in the field of practical application. Not only do we find that, for example, the usages of Hanseatic traders have proved in some instances to be in accordance with the views held by English courts rather than those expressed by the Reichsgericht.[11] We also notice that both legislators and courts try to free themselves from dogmatic straitjackets.

Thus, in the Anglo-American sphere the rigid rules with respect to ascertainment as a prerequisite to transfer of title and risk are increasingly bypassed. In addition, the "*res perit domino*" principle has been perforated to such an extent that it hardly retains any practical significance.

On the other hand, the legal ties between transfer of title and delivery, as established by German law, have been increasingly loosened. While the principle is still paid lip service, it is continuously circumvented by way of conditional sales, fiduciary transfers, and *constituta possessoria*. It may safely be said that, as a practical matter, property passes under German law at the time and under the conditions that the parties see fit to determine; in other words, the situation is hardly different from that under English and American law. The same goes for the abstract real contract (*abstrakter dinglicher Vertrag*)

[8] Sec. 448, German Civil Code.

[9] Sec. 269, subs. 3, German Civil Code.

[10] *Cf.* "Die Klausel "frei Grenze" im Maschinenbau," special publication no. 1/1955 of the Legal Department, Association of German Machinery Manufacturers.

[11] The decision of the Reichsgericht in Juristische Wochenschrift 1932, p. 587, which permitted the buyer, in cases when the ship had already arrived, to inspect the goods before accepting the bill of lading, under the "cash against documents" clause was strongly criticised in Hamburg commercial circles; it was regarded as repugnant to commercial standards of ethics. In this respect, the position taken by the Hanseatic traders is in accordance with the views expressed by Lord Kennedy and the House of Lords in Biddell Bros. v. Horst, [1911] 1K.B. 214, 934 at 952, [1912] A.C. 18.

by virtue of which the title passes under German law; it is now generally recognized as a dogmatic misconception and the courts refuse to apply the principle in practice whenever they can justify such refusal.[12]

With respect to the problem of the "double sale," the starting points are widely different in that Anglo-American and French law favor the first buyer as long as the second does not obtain possession of the chattel in good faith, whereas German law, quite apart from the question of good faith, favors the second buyer if it is with him that the seller first enters into an abstract real contract. Yet the *ius ad rem*, which had not been adopted by the German Civil Code, has been revived by the courts to a limited extent, in that the first buyer can sue not only the seller for breach of contract but also the second buyer, provided he acted fraudulently and unethically.[13] Finally, it should be noted that the rules concerning bills of lading and their representative function are becoming increasingly uniform throughout the world.[14]

The reviewer feels that the author would have rendered his readers a service if he had attempted to stress this point somewhat more than he has done. He would have been able to conclude that the apparent differences are for the most part not nearly as considerable as they seem to be. The reviewer does not wish to indulge in *beckmessering*. Most of the above comments refer to what the French would call "*vices de forme*." They do not, nor are they meant to, detract from the intrinsic value of the book which certainly deserves warmest recommendation.

EUGEN DIETRICH GRAUE*

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[12] See Brandt, Eigentumserwerb und Austauschgeschäft, Berlin 1940; Graue, Fahrnisübereignung etc.; Süss, Das Traditionsprinzip—ein Atavismus des Sachenrechts, Festschrift für Martin Wolff, Tübingen 1952, pp. 141 ff.

[13] See Palandt, Commentary on the Civil Code, sec. 826, ann. 8 q., Lagergren, p. 71.

[14] Schlenzka, Die sachenrechtlichen Streitfragen des Konnossementsrechts, Berlin 1937; Graue, Fahrnisübereignung etc.; Stödter, Geschichte der Konnossementsklauseln, Hamburg 1953.

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ADAMOVICH, L. *Handbuch des österreichischen Verwaltungsrechts*. Vol. 1. *Allgemeiner und materiellrechtlicher Teil*. Fifth edition. Vienna: Springer-Verlag, 1954. Pp. xvi, 317.

This is the first volume of Adamovich's work on Austrian administrative law.[1] It consists of two parts, the first dealing with administrative law in general and the second with administrative procedure. The first part compares public with private administration and deals with administrative law and its science. The position of the administrative branch of government under the constitution is lucidly discussed. It is on this point that the American reader becomes aware how different a result Montesquieu's idea of separation of

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[1] The second volume appeared in 1953. It was reviewed in 3 Am. J. Comp. L. 287 (1954).

powers has produced in this country on the one hand and in the Continental countries on the other hand. Under the Austrian system, which can be regarded as typically European, both the legislative and judiciary branches of government are separate from the executive; and the constitution expressly provides that the judiciary and executive are independent from one another on every level. Adamovich correctly describes as "administrative" those matters that are neither legislative nor judicial. The determination what is to be in any one of the three categories is up to the legislature. Thus a simple legislative enactment can provide that certain matters will be regulated by governmental regulation rather than by statute; and it is Parliament rather than constitutional or dogmatic principles that decides which matters, claims, rights, penalties, and so on, are to be settled by administrative agencies and which by the courts. Moreover, once a matter is legislatively declared to be administrative, there can be, quite in accordance with the principle of separation of powers as understood in Europe, no judicial control.

In the United States, we have rather adopted England's and Locke's idea of judicial supremacy, with which—according to our version of separation of powers—the executive must not interfere, to the extent that the administrative branch may merely "administer"—whatever that may mean other than law applying—but not decide. Since administrative agencies, however, must necessarily "decide" the matters assigned to them, their decision can have a mere preliminary effect, so to say, and the courts must have the last word.[2]

Recent decades have lead us to approximate the Continental system. Agencies are now making regulations although we still insist that they are but to fill in the gaps the legislator has left, and they are making decisions many of which are judicially unreviewable for one reason or the other. On the other hand, the countries of the Continent during the latter 19th century have learned the lesson that administrative agencies uncontrolled by—more or less objective—tribunals are tending to be arbitrary. Hence administrative review courts were set up everywhere. In Austria, as the present volume demonstrates, this function is being exercised by the *Verwaltungsgerichtshof*, whose essence the author briefly yet exhaustively describes, not without pointing out that at the time of the court's establishment in 1875 there was some sentiment in favor of judicial control of administrative agencies "after the Anglo-Saxon model." Yet, as everywhere else in Central Europe, the French model of the *Conseil d'État* was adopted.

However, Austria in 1949 has added to its administrative control through the Administrative Court another equally important one: judicial, we might say quasi-tort, liability for misadministration. Under this law anybody who has suffered damage through the unlawful act of an administrative official acting in performance of his lawful duties can sue the Republic of Austria for damages in the ordinary courts. It is probably unnecessary to indulge in com-

[2] See Parker, Separation of Powers Revisited: Its Meaning to Administrative Law, 49 Mich. L. Rev. 1009 (1951).

parisons between the rich United States whose Federal Tort Claims Act, despite its promising title, expressly excludes claims for maladministration,[3] and the impoverished Republic of Austria whose 1949 act invites them.

But of course the main topic of interest to American readers is not administrative control but the administrative process itself, to which a main part of the book is devoted. The law of administrative procedure was codified in 1925 by the enactment of four statutes. The first contains introductory and transitory provisions mainly delineating the agencies to which the other three statutes are applicable. The second is an administrative procedure act, the third regulates criminal administrative procedure,[4] and the fourth the execution of administrative decisions. The second and fourth of these statutes lend themselves to comparison with our law; and even a superficial reading of the author's excellent treatise shows how far our administrative-legal civilization is lagging behind Austria with her centuries of administrative, if not always political, wisdom.

Thus, the Austrian administrative procedure act has undertaken to define and regulate many problems on which our Administrative Procedure Act is either silent or vague. A "party," for instance, is carefully defined as a physical or juristic person who has a legal claim or interest in a particular administrative proceeding, as distinguished from the mere "partaker"[5] who has a mere metalegal, for instance economic, interest. A "party" but not a "partaker" has a right to inspect the file pertinent to his case, to be heard, to appeal to higher administrative authority, and to seek review in the Administrative Court. A "hearing" to comply with what we would call due process of law may be oral or in writing. As to the method of service, the Austrian act directs that service be done through the mails. Our law does not give contempt power to administrative agencies. The Austrian act carefully outlines the various penalties which agencies are authorized to impose.

There is no separation of functions as in some cases under our APA §5, and the author makes it clear that the inquisitory procedure is prevailing. Eleven sections are devoted to evidence, burden of proof, compulsory process, expert witnesses, documents, etc. Our agencies must not unreasonably delay a decision;[6] the similar Austrian provision is implemented by the mandate that, if the decision is not rendered within six months, the matter devolves to the jurisdiction of the next higher agency, and if the agency is the highest in the hierarchy, the matter can be treated by the party as adversely decided and hence ripe for review in the Administrative Court.

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[3] 28 U.S.C.A. §2680 (a); Dalehite v. United States, 346 U.S. 15 (1953); Gellhorn and Lauer, Federal Liability for Personal and Property Damage, 29 N.Y.U.L. Rev. 1324, 1327 (1954); Parker, The King Does No Wrong: Liability for Misadministration, 5 Vand. L. Rev. 167 (1952).

[4] As a result of the Continental approach to power separation and its refusal to recognize "inherently judicial" tasks, some minor crimes are tried before administrative agencies.

[5] *Beteiligter*.

[6] APA §10(e)(A).

Austrian administrative decisions, if final, are res judicata, a problem on which our statute is silent and the decisions are confusing. Res judicata applies to any kind of decision thus, e.g., to the issuance of a passport or trade license: once issued they may not be revoked, except, like a court decision, upon newly discovered evidence of which the agency without its fault could not avail itself before it rendered the decision. The police state claims that administrative decisions never create true vested rights and that they must therefore be revocable in the "public interest." Austria, weighing both the public and the private interest immanent in agency decisions, does indeed allow the cancellation of a final administrative decision in these three instances: (1) if no party has acquired any right from decision, as when an application was denied; (2) if the decision was an absolute nullity (total lack of jurisdiction, criminal result, etc.); or (3) if the cancellation of the decision is necessary to avoid conditions that are detrimental to the life or health of human beings or are "intolerably detrimental" to the national welfare. It will take American lawmakers a long time to hit the Gordian knot in a similar fashion.

Of equal interest are the provisions concerning the execution of administrative decisions, which is done—directly and without the intervention of the courts—through levying execution in a fashion analogous to judicial execution; exercising the agency's contempt power; having the act done by somebody else at the party's expense; or through physical force, e.g., arrest and detention.

The Austrian law presents many solutions which we would not want to reach and others which we shall reach some day in the same or a similar mode. All in all, we are reminded of Savigny's thesis that a legal civilization must have ripened sufficiently in order to be capable of codifying law. What is possible in our country as to, say, bills and notes is not yet possible in administrative law.

The book must be highly recommended.

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SCHILLER, A. A. *The Formation of Federal Indonesia 1945–1949*. The Hague/Bandung: W. van Hoeve Ltd., 1955. Pp. x, 472.

Professor A. Arthur Schiller of Columbia University, one of the few scholars in the field of Indonesian law in the English-speaking world, presents in this volume the story of the establishment of the federal state structure in Indonesia during the years following World War II. Professor Schiller had the advantage of being "on the spot" in Indonesia in the final stages of this process, in 1949; it was on 27th December 1949 that sovereignty over Indonesia was finally transferred by the Netherlands Government to the newly formed federal state, the United States of Indonesia (Republik Indonesia Serikat). The story of the exceedingly brief life of this most recent federal experiment—the federal state was succeeded within less than eight months by a unitary state, the

Republik Indonesia, with which the various member states had amalgamated —is told merely in an epilogue.

In his description and critical assessment of the emergence of the federal structure in Indonesia, the author chooses the lawyer's rather than the political scientist's approach; he examines and analyses the legal framework (statutes, decrees, regulations) of the various units. By making this frequently inaccessible material available to a wide public and by assessing its legal significance the author has provided a real service not only to all those interested in Indonesian political history, but to students of comparative constitutional law generally. However, the author's choice is not without danger, especially when dealing with a society in a period of revolutionary upheaval, such as Indonesia's in the immediate post-war period. A reader not acquainted with the story of Indonesian nationalism and its all-pervading influence throughout the whole of that period will find it difficult to assess the prospects the federal state really had. Was Indonesia not yet "ripe" for federalism? Or was it its basically Dutch sponsorship, bent on curbing the influence of the Republik Indonesia, which sounded the early death knell for the United States of Indonesia? It has often been asserted that the diversity of languages, races, religions, and economic interests of the various parts of the Indonesian archipelago predestines the country for a federal state structure. However, the reviewer feels that the climate of a young, vigorous nationalism is hardly conducive to the idea of a dispassionate sharing of power between central and state governments, which is the essence of the federal state. Moreover, in the words of Professor Wheare, whom the author quotes in his Introduction (p. 26), "Relative uniformity in size and the presence of financial resources to maintain both the general and the regional governments seem also to have been among the elements necessary to assure a federal government." It can hardly be argued that either of these prerequisites was present in the case of the Indonesian federal experiment of 1949–50.

At the same time the reviewer agrees with Professor Schiller that the experiences gained in many parts of Indonesia in the organisation of states, territories, and other units in the prefederal and federal period will prove of lasting value. This would apply particularly to East Indonesia where the reorganisation of government from its checkered and outdated pre-war basis progressed farthest.

The careful annotation and the useful glossary of Dutch-Indonesian-English terms deserves special mention.

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COHN, G. *Existenzialismus und Rechtswissenschaft.* Basel: Helbing & Lichtenhahn, 1955. Pp. 191.

The author of this tonic plea for individual justice is a highranking Danish diplomat and member of the Permanent Court of International Arbitration

at The Hague. He develops a legal theory not dissimilar from his earlier (1911) views on morality (*Ethik und Soziologie*, Leipzig: Barth, 2nd ed. 1919). Existentialism in the present essay means that both external things and our subjective knowledge of them are in free, unbound development, inaccessible to concepts, though accessible to life. What is called objective reality in this view is but the point of intersection between two incomprehensible lines of development at a given place and time (27). The starting point is, accordingly, the difference between thinking in concepts (*Begriffsdenken*) and thinking in realities (*Wirklichkeitsdenken*). The latter is perhaps best exemplified by the man who, in descending a staircase, makes a mistake as to when he reaches the bottom and comes down with a bump. He would naturally say, "I thought I was at the bottom," although he was not thinking about the stairs at all (Russell's example). Cohn believes that we know much more about things in themselves than is expressible in concepts or Kantian categories and even mentions the experiences of mystics.

However, the author makes concessions by recognizing that in the fields of mathematics, science, and statistics, concepts serve well enough. He concludes that, accordingly, there must be something objective and independent of both external things and our knowledge of them. But whereas in this field *essence* seems to govern existence, in others *existence* seems to govern essence. Especially in situations of moral or legal conflict, where emotional feelings are involved, thinking in concepts or essences in his view is out of place. Such conflicts are characterized by their uniqueness. Their solution derives from a unique reaction, a free and irrevocable choice involving risk and entailing lifelong responsibility. The only source of law is, accordingly, the individual case, its uniqueness barring all authority either of precedent or of norm. The doctrine of precedent errs in regarding the novel case as an old one; the free law school errs in postulating a freely found novel norm. In fine, the individual case is self-sufficient, an absolute end in itself.

In this extreme formulation, this is a stimulating radical thesis, naturally alien to the jurisprudence of conceptions, against which its main argument is directed, but not so alien to historical jurisprudence or legal realism. What the author has in mind is most apparent in the greatest cases of history (Socrates, Jesus, Joan of Arc, Dreyfus, *etc.*) in which the conflict indeed gathers and devours in its vortex nearly all interests in social and individual life and stirs up a storm that unexpectedly arises, rages, and passes away. Such conflicts call everything in question, including the law, shake and shatter moral and social consciousness, and leave behind a sense of catharsis. Most experienced lawyers know there is something unique in sufficiently controversial cases. What is in doubt is that they have none but individual features and that all cases are equally unique in this sense. The author's own view of science and statistics is damaging to his radical thesis. It could be hardly claimed that statistics is irrelevant to the legal field.

In its more tempered and practical formulation, this doctrine emphasizes

that it does not seek to eliminate definition, norm, rule, or legislative provision, nor to replace them by free arbitrament in the individual case. But since the norm is but a generalized and "watered-down" individual case (104), it has to prove its claim to be applied in the novel case (73). To take this freedom from the court, violates the principle of separation of powers; it amounts to encroachment by the legislature upon judicial power (127). The principle of *ordre public* ought to be applied to domestic as well as to foreign law; on this account, laws which are obsolete, or violate general principles of law or morality, should be disregarded. As an example the Danish law is mentioned, which in certain cases stiffened the punishment (of collaborators) and endowed the new provisions with retroactive force (85).

Even formerly (1927), the author queried the nature of mixed legal relations, such as *donatio mortis causa*, sale couched in a will, sale of theatre or railroad tickets, lease for work (*Hausmeistervertrag*). Now he finds that most legal relations are of a more or less mixed character. Accordingly, the correlativity of right and corresponding duty is loosened, with the obvious consequence that solution is derived from the concrete mixture in the individual case, but never from concepts (129).

Intertemporal and interterritorial conflict, connecting factors, renvoi, and the doctrine of local law are shown up as so many defeats of the jurisprudence of conceptions and also as instances of solution derived from the exigencies of the individual case. But the various interpretations of crime serve as the main pillar of the author's argument. He distinguishes within the reaction to crime and its repression three ineradicable elements: liability for external result (*Erfolgshaftung*), liability for subjective guilt presupposing free will (*Schuldmoment*), and the purely sociological consideration of milieu, prevention, and rehabilitation. Reaction to crime by all three layers is inevitable, although they represent in part half-buried atavistic reactions, so that the criminal is today a veritable motley of a person endowed with free will, and yet a necessary product of milieu (167). The solution, once more, derives only from the justice of the individual case, reaction being aroused always by the concrete murder, and never by its abstract definition in the code.

The author is justly worried about the decreasing harmony of professional and popular justice. He observes *Gesetzes-Hudelei*, that is to say, loosely drafted laws embodying vague compromises between political parties, agreements to disagree, and also the acceleration in legislative output that floods the law. He mentions the Nazi rule under which the Danish code was left virtually intact, while its effect was turned 180 degrees merely by changed professional application. On the other hand, he extols for its liberal and progressive provisions the Danish Criminal Code for Greenland of March 5, 1954. Most judicious is his remark that while the reception of Roman law in some countries has elevated the legal standard to a height unattainable by any solution of mere primitive conflict situations (69), yet this also estranged professional from popular justice and, on the whole, lowered legal consciousness, especially in

comparison to the northern countries where resistance against receiving foreign law was stiffer and personality and individual rights better respected (70).

In his practical proposals, the author may be over-optimistic, yet it is his merit to call for efforts to do something for the realization of his fine vision of individualized justice. His "undefinable" law is carefully distinguished from both imperative command theory and higher law doctrine. His optimism, however, seems to belie a little both his adverse experience and his existentialism. After his experience of general deterioration, can he expect satisfactory results from a court organized on a broad social basis, a Gallup sample of the population, including three learned judges, experts from all walks of life, and attorneys of the parties as members of the court, while the public prosecutor in his fighting accusatory role is eliminated, all these sitting around the green table and deliberating the best solution of the individual case, little embarrassed by the jurisprudence of conceptions, eradicated from legal education? Can a man of so delicate a sense for justice, who is troubled because of the prejudicial handling even by the legislature of landlords, capitalists, and minorities, believe that mere popular consciousness of justice, which under Nazi and Communist rule turned into abject nightmare, will produce solutions satisfying his own refined sense of justice? An existentialist might well recognize that a superior administration of justice itself is something unique, much as the individual case is unique, and certainly a rare flower of historical civilization.

BARNA HORVATH

WEBER, M. *On Law in Economy and Society.* Edited with Introduction and Annotations by Max Rheinstein. Translated by Edward Shils and Max Rheinstein. 20th Century Legal Philosophy Series, Vol. VI. Cambridge, Mass.: Harvard University Press, 1954. Pp. lxxi, 363.

Weber still exerts widespread influence on ideas on law, society, and economy. His work is a landmark mainly on three counts: his method, his definition of law, and his hypothesis of procedural dualism.

His method of interpretative understanding (*Verstehen*) applies to "social conduct," as distinguished from mere behavior in that it is "oriented" towards "some subjective meaning." By thus making "value" immanent in conduct, Weber's method could be "*wertfrei*," that is, exclusively interested in facts, causes, and effects, and yet at the same time also "interpretative" (*verstehend*), that is, reflecting the impact of inspiring ideas and values on the causal train of events.

This method was little more than a generalized version, applicable to social "types," of the best available models of historiography. Indeed, Weber's sociology of law is best characterized as an empirical, only tentatively systematized, theory of legal history. This may be best seen in the final abandonment of the hypothesis upon the verification of which his whole stupendous effort has been spent, namely, that modern capitalism and the formal logical rational-

ism of the law "peculiar to the Continental West ever since the rise of Romanist studies in the medieval universities," were somehow interdependent (318). The best that could be learned from Weber on the topic economy and law was correction of sweeping generalizations, verification of factors of legal development other than economic, such as the religious, political, and cultural, and clarification of the considerable indirection of the impact on each other of law and economy.

The method, which led to such important scientific results in legal history and sociology, looked more like that applied as *legal* method in the countries of origin and highest development of modern capitalism—the countervailing instances of Weber's initial hypothesis—than dogmatic "*Pandectenjurisprudenz*," the chief historical instance of that "formal logical rationalism" which to Weber appeared as the "pure type" of the legal, as distinguished from the sociological, method. This has suggested the idea whether some such method as Weber's might not yield better results in the legal field as well, both in practice and theory, than the dogma that a true lawyer has nothing to do neither with facts nor with values, but is exclusively concerned with formal concepts only. Weber himself felt uneasy about this, and so we are confronted with the curious fact that a master of sociology of law was somewhat unhappy about sociological jurisprudence.

Weber's scheme of general development in legal history—first, legal revelation through "law prophets," second, empirical finding of law, third, imposition by secular or theocratic powers, fourth and finally, systematic elaboration in the formal logical rational manner (p. 303)—seems to explain his uneasiness over modern antiformalistic tendencies. These stemmed precisely from sociological jurisprudence, both German and French, not to speak of Anglo-American jurisprudence. Weber has characterized their "rejection of the purely logical systematization of the law as it had been developed by Pandectist learning" as the "product of a self-defeating scientific rationalization" and as "flight into the irrational" (315). He clearly sensed the oncoming inevitable conflict between substantive justice and the formalism of rule-bound, detached objectivity (355). He foresaw not only that "the juristic precision of judicial opinions will be seriously impaired if sociological, economic, or ethical argument were to take the place of legal concepts" (320), but also that interference by "popular justice" or "public opinion" with the "rational course of justice" in a mass democracy "can be as disturbing as, or, under circumstances, even more disturbing than, those of the star chamber practices of an 'absolute' monarch" (356).

In his sympathetic comment on Weber's methodology, Rheinstein wisely warns against too sharp contrasting of methods, formal and substantive, rational and irrational. Indeed, he is at a hair'sbreadth from the obvious solution that law is neither pure norm nor pure fact but a continuous reference to both, the same as the *Ninth Symphony* or *Hamlet* (his examples) are neither the sound waves of the performance nor the written symbols which store them up for

memory, but "a content of some human mind or minds." However, as to methods, Rheinstein still believes that "nothing but confusion can result when they are mixed together" (lxx) and, accordingly, relegates sociological method to the "is," and legal method to the "ought." In this, he is merely echoing Weber and Kelsen. Both have insisted, it is true, on "purity of method." But they may have misunderstood their own methodological achievements which, as a matter of fact, as has been shown by various authors, *do* combine both methods, sometimes "in purity" and sometimes, unconsciously, in less than purity. Moreover, Rheinstein seems to favor the *substantive* rational method which he identifies, especially in the conflicts field, with sociological jurisprudence and with realism as opposed to the "conceptual jurisprudence" of the Bealites (liv). On the other hand, he admits that, notwithstanding their separate methods, the lawyer and the sociologist may have something to tell each other (lxxi). In saying this, he speaks precisely of Kelsen and Weber. But by combining these two votaries of formal logical rationalism, Rheinstein is unlikely to reach the haven of his own preferred method, the "*substantive*" kind of rationality.

Weber's method was dependent on his definition of social conduct. It was the "orientation" of behavior towards "subjective meaning" that made the difference between natural and social causation. His method could be "*verstehend*" only because social conduct could be interpreted, understood, by means of the "meaning" towards which it was "oriented." Included were social conduct and meaning defined by Weber as law. It would have been easy to conclude that Weber's own method applies to law, if he had recognized that law is neither the fact (behavior) element, nor the norm (meaning) element, of social conduct, in their isolation, but precisely the *incidence* of the norm upon the fact.

Such conclusion would have shown up Weber's method for what it *was*, unknown to the author blinded by his enthusiasm for dogmatic jurisprudence, the one and same *legal* method equally applicable, though perhaps with varying emphases, to the whole legal as well as to the social field, to law, legal history, and legal sociology. It may be that the latter are more concerned with facts, and their distorting effect on "subjective meaning," while law proper, in practice and doctrine, may be more concerned with the meaning itself as it impinges upon the facts. But these are mere differences in emphasis on various aspects of the same *synoptic structure*, which is indeed the same in the minutest detail as in the broadest generalization. Its import is that the meaning must be borne out by the facts, *at every step*, and the facts must be governed by the meaning, *at every step*. If this synoptic web, woven from the two threads of empiricism and rationalism, is torn asunder, *at whatever step*, the catastrophic lapse begins into that excessive "self-defeating rationalism" that ends in the "flight into the irrational." This did not happen, at least not to the extent it did in Civil Law countries where "written law" produced the excesses of "formal logical rationalism" in "*Pandectenjurisprudenz*," in the Common Law

world, or other countries with an "unwritten law" background, where common sense had kept legal thought more "whole" and had relied more, in case of doubt, on empirical verification.

Weber is a landmark, secondly, on account of his definition of law which, as Rheinstein aptly points out, escapes some of the major flaws of the Austinian command theory. Weber has introduced the criterion of the "enforcement staff" or "coercive apparatus." Since "coercion" has been diluted to include any kind of psychological means of enforcement, legal help (remedy), and legal consequence (invalidation), allowing thus for "indirectly guaranteed" and even "unguaranteed law," emphasis was put rather on the "staff" ready to do something about applying the law. By thus stressing the monopoly of specialized, increasingly professional, application rather than the physical enforcement of the law, Weber in fact has ushered in the "process" or "institution" theory of law.

The implications are clear only from his third achievement. This is the procedural dualism: informal proceedings of well established organs, on the one hand, or rich formality compensating for the lack of pre-established organs, on the other hand. While the former originates with the unrestrained administrative power of the master of the household within the primitive group, the latter originates with arbitration proceedings between kinship groups, relating to proof and composition of alleged injury, involving claims, rights, rules of evidence, statute of limitation, established formalities, in a word, the beginnings of judicial process (46).

Weber most ingeniously traced the subsequent diffusion and combination of these two distinct types of procedure, due mainly to the extension of the primary group. Especially did he elaborate the role of "cautelary jurisprudence," the art of draftsmen, such as the *cavere* practice of Roman jurisconsults and the draftsmanship of medieval Italian notaries. Had he followed Maine's hints, who first suggested the "dualism" as well as the import of primitive, Irish Brehon and Indian, cautelary private proceedings, he could have broadened his "institutionalism" to include not only the "enforcement staff" but also private transactions as elaborated by draftsmen into types of legal proceedings, providing for smoothly working remedies even short of judicial redress, types which the code, as Roubier has shown recently, often simply copies (*clause de style*) and which also subsequently silently improve on the code (*régimes matrimoniaux*).

But Weber stopped short of this broad sense of institutionalism. He even stopped short of judicial control, expressly stating: "it is unnecessary, in particular, that there be any *judicial* organ" (6). He was impressed by the bureaucratic administrative staff as identified with "the purest type of legal domination" and of "rational domination." Rheinstein quotes a four-page characterization of this as a specimen of Weberian "ideal type." Among the rather sketchily enumerated features, it was "official hierarchy," "formalistic impersonality," and "sole obedience to the law" which caught his eye as the highest form of formally logical, most rationalized, rule of law (xxxix–xliii).

All the difference between the merits of adjudication and administration, the Common Law and the Continental Civil Law approach, is involved in this solution of the problem of procedural dualism and institutionalism under the sole consideration of formal logical rationalism. A more balanced view would not deny, of course, the merits of expert bureaucratic administration, nor those of private, transactional institutionalization. It would insist, instead, on the merit of the judicial process: objective, impartial, independent cognizance This may be a feature inherent in the rule of law. Without procedure appropriately organized to check whether it is *the law* that is applied, and whether it is applied to the *proper facts*, the law cannot govern, the rule of law cannot be ascertained. Since this principle cannot be neglected with impunity, judicial control of the administration, and judicial review of legislation under a written constitution, may well be taken at least for the "ideal type" of law.

In this volume, the work of editing and translating is excellent, indeed. Rheinstein's annotations amount to a parallel scholarly treatise, examining not only perplexing problems of translation, which include some disturbing typographical errors in the German text, but also the advance of research, mostly more exact historiography or legal analysis, which puts Weber in the needed perspective. Equally welcome are the 57 pages of the Introduction written by Rheinstein. The context of Weber's *Sociology of Law*, its place within his entire work on *Economy and Society*, are drawn with the great care and clarity. Also its main problems and contents are explained and arranged in a way to make them most easily understood. Rheinstein succeeds in bringing Weber as close as possible to readers with a Common Law background. He erects hereby a monument for his beloved teacher and contributes to both comparison and rapprochement of the Civil Law and Common Law worlds.

BARNA HORVATH

COHEN, M. R. *American Thought. A Critical Study.* Edited and with a Foreword by Felix S. Cohen. Glencoe, Ill.: The Free Press, 1954. Pp. 360.

The reasons for the sketchy treatment in this volume of a topic of paramount interest both within and outside America are explained by the editor. He did not live to see the book but assures the reader in his Foreword that the chapters published had been approved by the late author, his father, for publication, while many chapters not so approved have been omitted. The book has an introductory chapter on the background of the American tradition, and separate chapters on history, science, economy, political, legal, and religious thought, aesthetics, and general philosophy. The reader is more than compensated for the uneven organization of the book by the author's unity of outlook, vivid portrayal of many outstanding features and figures, and his seasoned criticism.

The chapters on general philosophy and legal and political thought are not only in the focus of the author's interest but in a sense also sum up the rest. Cohen carefully characterizes the classical tradition in American legal thought

as "part of a movement of general enlightenment and liberation" (120). James Wilson successfully vindicated it by his device of harmonizing natural rights and the will of the people as complementary principles. This also makes the subsequent attacks on the classical tradition more intelligible in their nature. Similarly enlightening is the characterization of the classical tradition in philosophy. This is the idealist school climaxing in Josiah Royce, whose *The World and the Individual* (1901) is called "the nearest approach to a philosophic classic that America has yet produced" (279). And this school "as far as numbers and influence are concerned . . . continued to be the strongest force in American academic philosophy" (280). This makes clear both what had driven into the background the old Scottish philosophy of common sense, and what later called forth the modern reaction against "traditional" philosophy.

It is interesting to observe the parallelism between classical tradition in law and philosophy. Both are, in the formulation of Wilson on the one hand and of Royce on the other, representative "of the liberalism which originated in the European Enlightenment and is still alive in this country" (277). For later developments, there is in Royce's later writings "an analysis of the inadequacy of individualism and the recognition of human solidarity, the ignoring of which has led to the bankruptcy of liberalism in Europe" (278).

This is the point from which may start a better understanding of American idealism and realism, legal and philosophical, in comparison with each other and with similar developments elsewhere. Royce's logic is said to cut the ground from the discouraging prejudice that all that can be known are actually existing particular things. This being the greatest obstacle today to scientific study "of things as they ought to be," Royce's logic would warrant, on the contrary, the thesis that "the world of actuality is not the sole reality" (280). This statement like a streak of lightning illumines the issue, subsequently characterized: "the actual opponents of neo-realism are not so much the traditional schools of idealism but rather the psychological empiricists and other defenders of nominalism" (304). If the issue is not so much subjectivism *v.* objectivism but rather the reality of universals, one might conclude that American realism has little to do with the Aristotelian thesis, namely, that there exist no ideas outside things. Perhaps not all realists would concur in Cohen's interpretation. But so far as it goes, American realism looks more akin to medieval realism which predicates the reality of universals. Another source of misunderstanding is cleared up by defining, in contrast, Royceian idealism as "the view that the nature of the universe is not at bottom alien to our thoughts and moral effort, and that its true inner character progressively reveals itself in the process of our thinking" (276).

Cohen most instructively characterizes the philosophy of such outstanding thinkers as Chauncey Wright, Charles S. Peirce, James, Dewey, Santayana, Whitehead, and several others. Perhaps most interesting in his account is the vivid portrayal of Peirce and the diversification of James and Dewey. What he says in criticism of Dewey is of great value also for the characterization of

American thought in general, since nobody has divined its leanings better and administered to them more adroitly than this "national philosopher." And yet, "the American temper to which Dewey appeals . . . is only part of our national trait."

Characteristically, Cohen criticizes Dewey from a traditional viewpoint which is both American and European. For "there is another America, God-fearing and evangelical or vaguely spiritualistic which, though less noticed in our urban press and literature, is still perhaps the most dominant force in our country . . . our distinctive national philosophy is not pragmatism but the diluted and Americanized form of theosophy or neo-Platonism . . ." (292). Cohen's most persistent objection to the American temper is spelled out when he chides Dewey and his disciples for denying "the Aristotelian view that philosophic knowledge arises from natural wonder or curiosity, from the desire to know just for the sake of knowing" (295). In this momentous debate, in which Cohen is seconded by "the two least American of American philosophers, Whitehead and Santayana" (207), ultimate differences of outlook are indeed revealed. Yet even Cohen is somewhat impatient with epistemology, although he vindicates the theory of prime numbers, even though it does not promise any practical use.

While in the chapter on general philosophy Cohen speaks with the voice of a born thinker and seasoned expert, who would be respected everywhere, this is less true of his chapters on political and legal thought. This may be due in part to his lack of inside professional experience, and in part to confusion of legal philosophy with legal policy, the one limited to perennial problems of *all* law, the other concerned with *particular* problems of reform. He does not seem to have a sure touch for the latter and his own genuine general philosophy somehow fails to penetrate these fields. He fails to see, for instance, that his philosophical view of the reality of universals would entail, with whatever modifications in detail, precisely the classical doctrine of natural law and right against which, although "the great amount of truth in it" is recognized (124), his main criticism is directed.

No doubt, his portrayal of Holmes, Brandeis, and Cardozo is vivid. This great trias is indeed uniquely American and at the same time of universal significance. It could have served as an example of the difference between judicial philosophy and technical legal philosophy, the more so since Cardozo had discovered that the judge is daily confronted with age-old problems of *general* philosophy. Brandeis is chided for his "old-fashioned" individualistic liberalism, and Holmes for his *laissez-faire* faith in free enterprise and competition. This criticism does not measure up, however, to a full comprehension of their practical wisdom. Liberalism is certainly a central topic of this book, but a vivid sense of the difference between concession that has become necessary and headlong rush into the opposite principle, although occasionally blighted, is certainly more vigorous with the great trias than with a later generation, sometimes called "totalitarian liberals," whose native hue of resolution is, in either

direction, sicklied over with the pale cast of thought, called intellectualism. A more homebred, sturdy liberalism reappears with Justice Douglas who recognizes his debt to Brandeis. It seems to be characteristic of Cohen's own hesitancy that he appears to be critical of any vestige of conservative or traditional legal thought up to, and including, Pound but in his treatment of legal realism and functionalism he suddenly turns into the traditional conservative critic. Pound is chided for "a naive clinging to the fiction of the division of power between the judiciary and the executive." But Cohen's own alternative of "the fusion of judicial and administrative functions in commissions" is of course the incomparably more naive and antiliberal rollback of the separation of powers, however well it may work *under* that principle. Pound is also chided for insisting that "only rules and principles interpreted by courts can stand between the citizen and official incompetence, caprice, or corruption." The counter-argument is that "human—all too human—judges" do not provide such protection, while "all the relevant facts" to which principles are to be applied may be better known to "commissions." Indeed, Cohen goes so far as to say that "it is . . . hard to see the difference between cadi justice and a judge or juryman exercising his discretion" (160). All this is rather naive and exhibits the usual confusion of legal philosophy with legal policy. Whatever may have been the reasons for dissatisfaction with the court system in America, a liberal philosopher should not deny that independent courts are still the best available safeguard of liberty.

The tone of criticism markedly changes as soon as it is directed to the more recent schools. Oliphant is said to forget that "a variable factor cannot possibly explain a constant effect" and that "if we take a series of cases, we can eliminate variable factors and discover constant ideas or patterns" (173). The reality of universals suddenly begins to work. As against Underhill Moore, the argument is that there is "no way of drawing the distinction between legal and illegal behavior without reference to the system of ideas which authoritatively prescribe what we should and what we should not do" and that "who is properly a judge . . . itself depends upon our system of legal ideas" (174). As against Frank, it is pointed out that "the mere fact . . . that there are disturbances, that some people bribe juries, shows that there are recognizable legal rules which we normally expect to prevail" (175). This, by the way, seems to refute the former objection that jurisprudence cannot be replaced by descriptive sociology or that "the legal cannot be identified with the customary" (173). Arnold and Robinson are treated somewhat intellectualistically, the chief objection being that "ideas of the desirable social aim in the law are indispensable. And if we do not subject these ideals to a critical study, we continue to use them in traditional and superstitious ways" (176).

The grain of truth in the last objection indeed damaged the realists when it was exemplified in foreign totalitarian systems. Yet the disturbing, but superficial, false appearance could be, and has been, easily eliminated. The realist school was perhaps the first distinctively American one, and this calls for atten-

tion. It still holds great hopes for the future, their realization being dependent on ample funds for research work on strictly scientific lines. The "nominalistic" charge is of course irrelevant; they were certainly no more nominalistic than are modern physicists or mathematicians. And whether judges are made by law, or law by judges, whether the distinction between legal and illegal behavior indeed presupposes a system of authoritative prescriptions, or rather the latter is born with, and read from, the former, is not so easy to decide. Medieval realism (of universals), however fascinating, is of no great help in deciding this question. The subtle reason for this is that, after all, not merely ideas (or ideals) but also the facts themselves are warranted by their respective "universals."

Anyway, it is moving to observe that the first serious effort in America to establish something like the philosophy or theory of legal science as a working program has been misunderstood and discouraged precisely by those who were its forerunners. One wonders whether this, too, is a characteristically American response, or whether it is just characteristically human?

It is indeed difficult to generalize about America and American thought. And the chief merit of this book is that both by its deep insights and its outspoken criticism it challenges the reader's own information and judgment. It throws light even by its shortcomings or prejudices. For this genuine help in self-education many generations of newcomers will be grateful.

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Book Notices

Yearbook 1953–1954. International Court of Justice. Leyden: A. W. Sijthoff's Publishing Co., 1954. Pp. 302.

This volume, prepared by the Registrar of the Court, J. López Oliván, under Court instruction of March 1947, in order to provide general information concerning its organization, jurisdiction and activities, covers the year ending with July 15, 1954.

If general information is the purpose, this is served better, it is believed, by the few *cumulative* surveys it offers —parties to the Statute, compulsory jurisdiction, list of candidates, digest of decisions, index of bibliography— than elswhere by information *additional* to preceding yearbooks. References to these encumber and obscure information when it is admitted, for example concerning jurisdiction, that "to have a complete picture . . . it is necessary to consult the eight Yearbooks published" (202). Reconciliation of the two viewpoints of editorship will result in a yearbook of *selective* cumulative information, as exemplified by the United Nations Yearbook and by the Yearbook on Human Rights.

For example, this volume summarizes only the three judgments, one advisory opinion, and one Court order delivered in the period under review. Since only 15 contentious cases and 7 cases for advisory opinion have been submitted thus far to the Court altogether, their short summary might be conveniently cumulative, covering the entire period from 1946. This would be certainly more to the purpose of general information than, for example, the full General List of the Court, copying in print all the folios, or the bulky specialized bibliography of a single year.

The Budget for the financial year 1954 totalled $621,980, while the Budget Accounts for the financial year 1953 exhibit $588,700.00 credits and $558,514.78 expenditure. From this the general public may see how slight in comparison are the Court's expenses. It is quite interesting to observe that sale of publications amounted to $2,500, and contributions of States nonmembers to $9,000.

The list of declarations in acceptance of compulsory jurisdiction, with conditions and exceptions stipulated, is most informative. In the latest Australian declaration, the continental shelf, the sea-bed, and subsoil, and jurisdiction over Australian waters appear as new items, additional to the usual exceptions. Among the 32 states accepting compulsory jurisdiction of one kind or another, the absence of the entire Soviet bloc is most conspicuous. But several other members of the United Nations, 24 in number, also fail to show up, including for instance Belgium, Brazil, Egypt, and Yugoslavia, to name only countries whose nationals were, or are still, elected members of the Court, as are those of Russia and Poland (but not Czechoslovakia). Only Haiti, Nicaragua, and Paraguay have accepted compulsory jurisdiction unconditionally. Most countries make reciprocity and/or ratification a condition and set a time limit. Switzerland and Liechtenstein limit jurisdiction to legal disputes enumerated in Article 36 of the Statute of the Court, copying its text instead of merely referring to it, as do many other countries that in addition stipulate further conditions which the former do not. The severest condition, apt to nullify compulsory jurisdiction altogether, occurs in the French, Liberian, and United States declarations which except disputes essentially within domestic jurisdiction as the government of the respective country "understands," "considers," or "determines." Other countries, including the whole British Commonwealth, are content with excepting "questions which

by international law fall exclusively within" their domestic jurisdiction.

During the period under review, the Court lost Sir Benegal Rau, justly lamented, and got Kojevnikov who, having studied law in Moscow in 1926 and 1927, was professor and dean, people's juryman, editorial member of the Soviet Academy's Law Review, and member of the International Law Commission of the United Nations, and seems to represent the new type of Soviet jurist who now replaces such an authority as Krylov, inherited from the Czarist regime, the only Russian member who ever sat on the Court (Golunsky did not take seat).

Pondering the list of candidates one cannot but regret that the Court has been thus far deprived of the opportunity to profit by the learning and professional authority of men like Brierly, Evatt, Fenwick, Hudson (who sat on the former Court), Kleffens, Spiropoulos, or Veerzijl, to name but a few. In the period under review, the Court was composed of 3 West-Europeans, and 3 East-Europeans, 2 North-Americans and 4 South-Americans, 1 African, and 2 Asians.

BARNA HORVATH

Anuario de Filosofia del Derecho. Tomo I. Publicaciones del Instituto Nacional de Estudios Jurídicos. Madrid: Ministerio de Justicia y Consejo Superior de Investigaciones Científicas, 1953. Pp. xi, 543.

Publication of this volume of notable studies in legal philosophy is due to the combined efforts of the Spanish Ministries of Justice and Education. It is a remarkable venture which testifies to genuine government interest in the advancement of learning. Spain belongs to the few countries which have established university chairs exclusively devoted to legal philosophy, considered as a key in the field of legal, political, and social studies. These "catedraticos" form the editorial board of this yearbook.

Legaz y Lacambra (Luis), one of the editors, and rector of the University of Santiago de Compostela, the noted legal philosopher, has contributed the leading essay on legal obligation: *La obligatoriedad jurtdica* (p. 5–89). He is mainly concerned with the distinction of moral and legal obligations which reflect on each other so copiously. Thus, man is bound in conscience to obey the law and owes this obedience to the statute itself, not to divine or natural law behind it; and yet the statute is but the *occasion* of this moral obligation in conscience. The so-called merely penal laws (*leges mere poenales*) fling the door wide open before modern conceptions of legal obligation. A man is morally bound (in conscience) to obey the statute, but as a *subject*, he is bound legally (*in foro externo*) to obey the law of the land. Since, however, the legislature may oblige to a "monstruosity," the supreme criterion of obedience is the *subject matter* of the legal regulation. The structure of the legal "ought" is the legal precept or norm individualized. It differs from "civil obligation" in that the former means integration, while the latter means co-ordination. A vast literature, classical and modern, is examined, in which I have missed Green's *Principles of Political Obligation*. Most interestingly, some common problems of law and moral theology, as represented in modern form by Vermeersch for example, are investigated.

The late Gómez de la Serna y Favre has contributed a biting criticism of neo-Kantian legal philosophy, focussed on Stammler (p. 93–234). He points out how neo-Kantianism falls short of Kant himself, and how Stammler's liberalism lags behind his time which Kant's did not. Many objections formerly made by others (not always quoted), such as arbitrary use of the terms form and matter, inapplicability of the transcendental method to law, and unwarranted extension, or restriction, of the spheres of society, economy, and law, are set in glaring light.

A well-written paper by Garcia

Valdecasas on sentence and precept, "Juicio y precepto" (p. 277–299), is devoted to the refutation of the view that norms may be reduced to fact propositions. A study in legal realism, "Principios para una teoría realista del Derecho" (p. 301–330), by D'Ors y Pérez Peix, offers fourteen variations on the theme that law is what the judges approve. In a study of greater import, "Prolegómenos a una teoría del Estado concebida como ciencia historica" (p. 235–275), Galán y Gutiérrez predicts a reappearance of the totalitarian state but in the service of liberal and democratic principles, and later the disappearance of the national state altogether in favor of ecumenic political organization. Fueyo Alvarez, one of the secretaries to the editorial board, in "El sentido del Derecho y el Estado moderno" (p. 331–394), investigates the Roman, the Christian, and the modern sense of law and justice, and its crisis under the impact of positivism.

Reviews of books and periodicals, the latter arranged according to subject matter, make up one third of the volume. Their organization testifies to good editorship. There is one serious error displaying a good sense of humor. An article by Sidney Ratner in Social Research is quoted both on page vii and page 488 of this volume as "The Evolutionary Nationalism of John Dewey." It should read of course Naturalism.

BARNA HORVATH

WALD, A. *O mandado de segurança.* Rio de Janeiro: Departamento Administrativo do Serviço Publico, 1955. (Ensaios de Administraçao No. 2). Pp. 113.

Brazil has evolved an interesting summary remedy against abuses and illegal acts of administrative authorities. The writ of security, in somewhat similar fashion to the Mexican *amparo*, evolved out of the extension that had been given to the writ of habeas corpus and other precedents. This special writ was provided for by the 1934 constitution and a 1936 statute. Wald traces its history, compares it with analogous procedures in other countries, especially France and the United States. He then proceeds to give a succinct but clear analysis of subsequent legislation, of the scope of the writ and of the procedure involved, with ample citation of cases and doctrinal writings. The writ is effective not only against administrative authorities but against public utilities privately owned, and is available in cases not covered by the typically Brazilian development of habeas corpus. The book closes with a defense of the institution against recent attacks.

PHANOR J. EDER

PROSSER, W. L. *Selected Topics on the Law of Torts.* Ann Arbor: University of Michigan Law School, 1953. Pp. xi, 627.

In the lectures gathered in this volume, Dean Prosser has given a masterful treatment of the various topics he has selected in the law of Torts. One cannot but admire the depth and clarity of his thought, and many of his comments are most illuminating. One feels, for instance, that there is little doubt that his are the true explanations of why the jury system makes it difficult to apportion damages in cases of contributory negligence. Or, again, the developments devoted to the rule in *Rylands* v. *Fletcher* are excellent; it is shown that, although the American courts generally refuse to follow the rule as they understand its scope, their actual decisions are in fact very close to those of the English courts.

However, the main center of interest in the book is undoubtedly his study of causality, when he deals with the *Palsgraf case;* this lecture will certainly become one of the classics on the subject. For any scholar interested in torts, a reading of Dean Prosser's book is essential, and the task will prove as pleasant as it is useful.

DENIS LEVY

Books Received

Mention in this list does not preclude a later review

Argentina

Cardozo, B. N. *La Naturaleza de la Función Judicial.* Traducción de la primera edición inglesa (1921) por Eduardo Ponssa. Buenos Aires: Ediciones Arayú, 1955. Pp. xxiv, 146.

Ibañez de Aldecoa, A. *Meditaciones Sobre la Cientificidad Dogmática del Derecho Processal.* Buenos Aires: Ediciones Arayú, 1954. Pp. xxii, 148.

Ymaz, E. *La Esencia de la Cosa Juzgada y Otros Ensayos.* Buenos Aires: Ediciones Arayú, 1954. Pp. xxii, 282.

Australia

Perlman, M. *Judges in Industry. A Study of Labour Arbitration in Australia.* Foreword by R. M. Eggleston. Melbourne: Melbourne University Press, 1955. Pp. xviii, 219.

Belgium

Dekkers, R. *Précis de Droit Civil Belge.* Vol. 3. *Les Régimes Matrimoniaux; Les Successions; Les Donations et les Testaments.* Bruxelles: Établissements Émile Bruylant, 1955. Pp. 942.

Sarot, J. *Conseil D'État: Répertoire des Arrêts et Avis de la Section D'Administration, 1948–1953.* Bruxelles: Établissements Émile Bruylant, 1955. Pp. 431.

Denmark

Chroust, A.-M. *Xenophon, Polycrates and the "Indictment of Socrates."* Reprint from Classica et Mediaevalia, Vol. XVI, Fasc. 1–2. Copenhagen: Librairie Gyldendal, 1955. Pp. 77.

France

Vergnaud, P. *L'Idée de la Nationalité et de la Libre Disposition des Peuples dans ses Rapports avec L'Idée de L'Etat (Etude des doctrines politiques contemporaines) 1870–1950.* Foreword by J. J. Chevallier. Paris: Editions Domat-Montchrestien, 1955. Pp. 258.

Germany

Andreae, W. *Geld und Geldschöpfung.* Mit einem Anhang: *Der Staat und die Notenbanken.* Stuttgart: Humboldt-Verlag, 1953. Pp. 476.

Blaesner, H. *Die wichtigsten Bestimmungen im Haftpflichtrecht.* 3rd ed. Karlsruhe: Verlag C. F. Müller, 1955. Pp. 96.

Bülow, A.—Arnold, H. *Der internationale Rechtsverkehr in Zivil- und Handelssachen.* 1. Ergänzungslieferung, November 1955. München und Berlin: C. H. Beck'sche Verlagsbuchhandlung, 1955. Pp. xiv, 100–1100.

Dallreich, H.—Doehring, K.—Jaenicke, G.—Strebel, H.—Weiss, G. *Das Staatsnotrecht.* Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht. Köln: Carl Heymanns Verlag KG., 1955. Pp. viii, 268.

Hoffmann, W. *Gesetz zur Regelung von Fragen der Staatsangehörigkeit.* Stuttgart: W. Kohlhammer Verlag, 1955. Pp. 113.

Jacobi, E. *Wechsel-und Scheckrecht unter Berücksichtigung des ausländischen Rechts.* Münsterische Beiträge zur Rechts- und Staatswissenschaft. 3. Lieferung. Berlin: Walter de Gruyter & Co., 1955. Pp. xv, 693–1057.

Massfeller, F. *Deutsches Staatsangehörigkeitsrecht von 1870 bis zur Gegenwart.* 2nd ed. Sammlung geltender Staatsangehörigkeitsgesetze. Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht der Universität Hamburg. Frankfurt/Berlin: Alfred Metzner Verlag, 1955. Pp. 455.

Müller-Freienfels, W. *Die Vertretung beim Rechtsgeschäft.* Tübingen: J. C. B. Mohr (Paul Siebeck), 1955. Pp. xxi, 432.

Schönke, A.—Schrade, W. *Einführung in die Rechtswissenschaft.* 6th ed. Karlsruhe: Verlag C. F. Müller, 1955. Pp. xi, 275.

STRAUCH, K. *Devisenverkehr.* Der Wirtschafts-Kommentator. Teil C. Wirtschaftsrecht I. Frankfurt: Verlag Kommentator, 1955. Pp. iv, 69.

WOLF, E.—NAUJOKS, H. *Anfang und Ende der Rechtsfähigkeit des Menschen.* Frankfurt: Vittorio Klostermann, 1955. Pp. 240.

GREAT BRITAIN

The Babylonian Laws. Vol. II. Edited with Translation and Commentary by G. R. DRIVER AND JOHN C. MILES. Oxford: At The Clarendon Press, 1955. Pp. vii, 426.

BIRCH, A. H. *Federalism, Finance and Social Legislation in Canada, Australia and the United States.* Oxford: At The Clarendon Press, 1955. Pp. xiv, 314.

Current Legal Problems 1955. G. W. KEETON AND G. SCHWARZENBERGER eds. The Faculty of Laws, University College, London. Vol. 8. London: Stevens & Sons Limited, 1955. Pp. vii, 247.

GRAVESON, R. H. *The Conflict of Laws.* 3rd ed. London: Sweet & Maxwell, Ltd., 1955. Pp. xxxiv, 506.

HOLDEN, J. M. *The History of Negotiable Instruments in English Law.* University of London Legal Series. London: The Athlone Press, 1955. New York: John de Graff, Inc., 1955. Pp. xxxix, 350.

LALIVE, P. A. *The Transfer of Chattels in the Conflict of Laws. A Comparative Study.* Oxford: At The Clarendon Press, 1955. Pp. xix, 200.

The Law in Action. A series of broadcast talks. Foreword by LORD ASQUITH OF BISHOPSTONE. London: Stevens & Sons Ltd., 1954. Pp. vii, 90.

MEGARRY, R. E. *Miscellany at Law.* London: Stevens & Sons Ltd., 1955. Pp. xvi, 415.

PHILLIPS, O. H. *A First Book of English Law.* 3rd. ed. London: Sweet & Maxwell Ltd., 1955. Pp. xxiv, 298.

SCHWARTZ, B. *American Constitutional Law.* Foreword by A. L. GOODHART. Cambridge: At The University Press, 1955. Pp. xiv, 364.

WILLIAMS, G. *The Proof of Guilt. A Study of the English Criminal Trial.* The Hamlyn Lectures. London: Stevens & Sons, Ltd., 1955. Pp. viii, 294.

ITALY

VITTA, E. *Conflitti Interni ed Internazionali.* Saggio Comparativo, Vol. I; II. Università di Torino, Memorie dell'Istituto Giuridico, Serie II. Torino: G. Giappichelli, 1954. Pp. 225; 266.

MIRABELLI, G. *L'Atto Non Negoziale nel Diritto Privato Italiano.* Napoli: Casa Editrice Dott. Eugenio Jovene, 1955. Pp. xi, 462.

NETHERLANDS

BONNICHON, A. *Law in Communist China.* The Hague: International Commission of Jurists, 1955. Pp. 35.

VAN HECKE, J. *Problèmes juridiques des emprunts internationaux.* Bibliotheca Visseriana. Leiden: E. J. Brill, 1955. Pp. x, 310.

MEIJERS, E. M. *Verzamelde Privaatrechtelijke Opstellen.* Vol. I. Leiden: Universitaire Pers Leiden, 1954. Pp. xii, 407.

SAAR

WIEBRINGHAUS, H. *Das Gesetz der funktionellen Verdoppelung. Beitrag zu einer universalistischen Theorie des Internationalprivat- und Völkerrechts.* Foreword by DR. GEORGES SCELLE. 2nd ed. Saarbrücken: West-Ost-Verlag GMBH., 1955. Pp. 157.

SOUTH AFRICA

COWEN, D. V.—GERING, L. *The Law of Negotiable Instruments in South Africa.* 3rd. ed. Cape Town: Juta & Company, Ltd., 1955. Pp. xxxvii, 534.

MAY, H. J. *The South African Constitution.* 3rd. ed. Cape Town: Juta & Co., Ltd., 1955. Pp. xxxvii, 678.

SPAIN

ALBI, F. *Derecho Municipal Comparado del Mundo Hispanico.* Prólogo de Carloz Ruiz del Castillo. Madrid: Aguilar, S. A., 1955. Pp. xxviii, 678.

CASTÁN TOBEÑAS, J. *La Condicion Social y Juridica de la Mujer*. Madrid: Instituto Editorial Reus, 1955. Pp. 233.

DE LUGO REYMUNDO, L. B. *Tratado de Seguros*. Vol. I. *Principios generales e historia del seguro; El contrato de seguros*. Vol. II. *Los seguros de daños*. Vol. III. *Los seguros de personas; Contratos derivados del de seguros; Contratos imperfectos de seguros; Regimenes legales de las empresas de seguros privados*. Madrid: Instituto Editorial Reus, 1955. Pp. xxxii, 576; xii, 647; xii, 625.

SWITZERLAND

HAUSSMANN, F. *Das Dilemma eines deutschen Antitrustgesetzes. Hindernisse und Lösungsmöglichkeiten*. Bern: Verlag Stämpfli & Cie., 1955. Pp. 75.

UNITED STATES

1954 Annual Review of United Nations Affairs. EAGLETON, C.—CHAMBERLIN, W.—SWIFT, RICHARD N. eds. New York: New York University Press, 1955. xi, 253.

BONFORTE, J. *The Philosophy of Epictetus*. New York: Philosophical Library, 1955. Pp. xiv, 146.

CHROUST, A.-M. *The Legal Profession in Ancient Imperial Rome*. Reprint from Notre Dame Lawyer, Vol. XXX, No. 4. Indiana: University of Notre Dame, 1955. Pp. 521–616.

DONDO, M. *The French Faust: Henri de Saint-Simon*. New York: Philosophical Library, 1955. Pp. 253.

EDWARDS, J. *Mens Rea in Statutory Offences*. English Studies in Criminal Science. Edited for Department of Criminal Science, Faculty of Law, University of Cambridge, by Radzinowicz, L. New York: St. Martin's Press, 1955. Pp. xiv, 297.

GRIFFITH, E. S. *Congress: Its Contemporary Role*. 2nd. revised edition. New York: New York University Press, 1956. Pp. xi, 207.

LAMONT, W. D. *The Value Judgement*. New York: Philosophical Library, 1955. Pp. xv, 335.

NEUMANN, R. G. *European and Comparative Government*. 2nd ed. New York: McGraw-Hill Book Co., Inc., 1955. Pp. xiii, 818.

PATTERSON, B. *The Forgotten Ninth Amendment*. Foreword by Roscoe Pound. Indianapolis: The Bobbs-Merrill Co., Inc., 1955. Pp. ix, 217.

Report from Strasbourg, August 1955: Britain and the Unification of Europe. New York: American Committee on United Europe, 1955. Pp. 15.

REULET, A. S. *Contemporary Latin-American Philosophy*. Albuquerque: The University of New Mexico Press, 1954. Pp. xx, 285.

RUNES, D. *On the Nature of Man*. New York: Philosophical Library, 1956. Pp. 105.

SCHOENFELD, C. *God and Country*. New York: Philosophical Library, 1955. Pp. vi, 119.

A Statement of the Laws of Bolivia in Matters Affecting Business. 2nd ed. Revised and enlarged by URQUIDI, C. W. Washington: Pan American Union. 1955. Pp. viii, 158.

Status of the Pan American Treaties and Conventions. Law and Treaty Series. Washington: Pan American Union, 1955. Pp. iv, 31.

Universal Copyright Convention Analyzed. T. R. KUPFERMAN—M. FONER editors. New York: Federal Legal Publications, Inc., 1955. Pp. xvi, 668.

Bulletin

Special Editor: KURT H. NADELMANN

American Foreign Law Association

COMPARATIVE LAW PRIZE

André and Suzanne Tunc, well-known French legal writers, have received the Comparative Law Prize of the American Association for the Comparative Study of Law, Inc., for their authorship of the three-volume work, *Le Système Constitutionnel des États-Unis d'Amérique* (I: Histoire Constitutionnelle, II: Le Système Constitutionnel Actuel, Paris, 1954) and *Le Droit des États-Unis d'Amérique*: Sources et Techniques (Paris, 1955).

The Association's Prize was established by vote of the Board of Directors last year as a method of affording recognition from time to time for outstanding contributions to this area of international legal study. The first award of this Prize, to Mr. and Mrs. Tunc, was recently ratified by the sponsor members of the Association.

REPORTS

INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE—The Executive Committee of the International Association of Legal Science held its annual meeting in Istanbul on September 8, 9, and 10, 1955. Representatives of France, Germany, Sweden, Turkey, the United Kingdom, the United States, and Mr. de Sola Cañizares for Spain and Latin America attended.

Plans were laid for a congress to be held in Barcelona in September 1956 to discuss in four round tables: the reception of foreign law in newly developed countries, with special reference to India; the right of a surviving spouse to the estate of the decedent; the contribution of law to the stability of the family; *audi alteram partem*. In addition, there will be a plenary discussion of legal education.

Plans were also made to accept UNESCO's invitation to conduct a meeting of experts in Paris in February, 1956, to consider subjects appropriate for study in implementation of the UNESCO General Assembly's resolution 3.4114, adopted at Montevideo and asking the UNESCO secretariat to determine how the various social science disciplines might contribute to an alleviation of tensions between East and West.

The Association's program of bibliographies is gaining momentum. The first edition of "*A Register of Legal Documentation in the World*" has been exhausted, and a second and revised edition is in preparation. There will also be published in 1957 a bibliography of English law and another of Scandinavian law. Bibliographies on the laws of Germany, Italy, and Argentina are in preparation. A catalogue of the Institutes and Centers of Comparative Law throughout the world has been completed and will be published in 1956. A brochure on the International Association and its work is in preparation.

Two colloquia were held by the Association during 1955. One was held in Turkey immediately prior to the Executive Committee's meeting. It concerned the reception by Turkey of the Swiss Civil Code and the French system of administrative courts. Papers were prepared by Turkish authorities. Experts on the reception of foreign law were invited to discuss them. The papers and discussion will be published. The second colloquium

was held in Oxford in mid-September under the chairmanship of Professor F. H. Lawson to prepare a working paper for the Barcelona colloquium on *audi alteram partem*. It was decided to restrict the discussion to the right to a hearing in administrative proceedings.

JOHN N. HAZARD

UNITED STATES NATIONAL COMMITTEE OF THE INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE—The Advisory Committee of the United States National Committee (American Foreign Law Association) of the International Association of Legal Science met at New York, on December 3, 1955, under the chairmanship of Hessel E. Yntema, United States representative on the Executive Committee of the Association. The results of the Istanbul meeting, reported above, and the plans for the forthcoming Barcelona meeting of the Association were discussed.

COMPARATIVE LAW COLLOQUIUM AT EDINBURGH—The United Kingdom National Committee of Comparative Law held a two-day colloquium at Edinburgh on 11th to 13th of July 1955, under the general direction of Professor F. H. Lawson of Oxford University. In making its plans, the Committee kept in mind the fact that overseas lawyers would be in Britain to attend the Empire and Commonwealth Law Conference. The theme of the colloquium, appropriately, was "The influence of English law upon other systems of law within the Commonwealth." Some forty persons, most of them law teachers, attended. A number were from the Commonwealth and two were from the United States—Professors Jerome Hall and Max Rheinstein.

Four subjects were selected for discussion: (1) innocent misrepresentation and undue influence; (2) the effect of marriage on property; (3) admissibility of evidence; (4) British parliamentary procedure. The writer of this note elected to attend the discussions on the law of evidence, of which Professor J. L. Montrose of the University of Belfast was chairman. The discussion was directed to "confessions and illegally obtained evidence." Professor R. W. Baker of the University of Tasmania began the discussion with a paper which surveyed the law of England, Australia, Canada, and the United States.

It appeared from the discussion on confession that notwithstanding the general rule that a confession is admissible if voluntarily made there are cases and statutes in some jurisdictions that require exclusion of confessions even if they meet the test of voluntariness. The conflict between the need to punish the guilty and the need to protect the citizen from unfairness emerged in this discussion, and appeared still more clearly in the second problem—that of admissibility of evidence illegally obtained, for example by a trick, or without a proper search warrant, or after an illegal arrest. The cases from different jurisdictions show extreme positions—from that of English law which generally permits introduction of the evidence—e.g. of objects obtained by the prosecution as the result of an illegal search or a coerced confession, and that of the Supreme Court of the United States in federal cases, where the accused can apply to the court to have the object returned to him. It was apparent from the discussion that this difference of opinion extended to those taking part in the discussion.

W. F. BOWKER

THE COMMONWEALTH AND EMPIRE LAW CONFERENCE—The first conference of British Commonwealth and Empire Law Societies and Bar Associations was held in London in July 1955 and considered an interesting working program. Among the matters discussed were the Jury System, Causes of Congestion in the Courts, Systems of Land Tenure and Transfer, and Legal Aid.

The discussion of the Jury System showed that, with the exception of South Africa which has its special problems, there was a general consensus of opinion that the system of trial by jury ought to be maintained in criminal cases. A sharp

divergence of opinion developed over the merits of a jury in civil cases.

Only Alberta it seems has no problem of congestion of court business. Elsewhere the causes, all were agreed, were (1) a general increase in litigation; (2) the failure to provide an adequate increase in the number of judges and court accommodation to meet the demands created by ever-mounting populations and increasing awareness of the citizen's rights, due to improved welfare services; (3) the large increase in road and industrial accident cases and in matrimonial disputes; and (4) the ability, thanks to legal aid services, to bring proceedings where formerly financial considerations prevented it. Among the remedies which were suggested were the curtailment of trial by jury in civil cases, additional use of recording machines, the cutting of unnecessary eloquence by advocates, and limiting the number of expert witnesses.

It quickly became apparent, as regards systems of land tenure and transfer, that the practical choice throughout the Commonwealth lay between the system of private conveyancing which is in force throughout most of England and Wales and some system of registration of title, be it derived from the Torrens system, the English system, or some other. All substantially agreed that the advantages of a system of registration of title outweighed its disadvantages, although speakers from the Channel Islands, where there is a relic of the feudal system, and from Ceylon and South Africa, which have no system similar to the Torrens system, all appeared to be satisfied with their existing systems as supplying the needs of the country.

The Legal Aid session found little difficulty in concluding that in some form or another a service ought to be made available for all citizens who would otherwise be unable for financial reasons to embark on litigation. While it would be premature to consider reciprocal arrangements before the various Commonwealth countries had similar schemes to those in force in England and Scotland, it was the view that when legal aid had developed further in the Commonwealth countries, consideration should be given to the formation of a Joint Standing Legal Aid Committee for the Commonwealth.

Among the matters discussed primarily of professional interest were: Professional Ethics, Recruitment to the Profession and Standards of Education for Admission; Fusion of the two Branches of the Legal Profession; Retirement Benefits; Reciprocity of Admission, and Overseas Relations.

T. G. LUND

EXCHANGES OF LAW TEACHERS AND STUDENTS—On December 28, 1955, at the annual meeting of the Association of American Law Schools, there was a Round Table meeting of the Association's Committee on Foreign Exchanges of Law Teachers and Students. The principal speaker was J. Manuel Espinosa, Chief of the Professional Activities Division in the International Exchange Service of the State Department. He spoke about the opportunities and procedures for American law teachers and scholars to go abroad, and for American law schools to bring foreign law teachers and scholars to the United States. Professor Hessel E. Yntema expressed some thoughts which had come to his attention during the time that he served as a member of the Fulbright Law Selection Committee, pointing out particularly the problem of the limitation placed on the availability and utilization of foreign scholars by the general Fulbright requirement that their visit should be of a minimum duration longer than these people can absent themselves from their own institutions.

Professor Otto Kahn-Freund, of the London School of Economics, and presently Visiting Professor of Law at Yale, spoke about what might be expected of an American law teacher as visiting professor in England. He pointed out the many areas of interest and usefulness which an American professor could contribute to the program of legal education in England. Professor Yvon Loussouarn, of the Faculty of Law of Rennes, discussed the same topic for the American

law professor in France. Of course, the participation in instruction would have to be done in French.

For the other aspects of exchange programs, Associate Dean Cavers, of Harvard, described the current programs of the Harvard Law School. In particular, he discussed the Japanese exchange program under which a number of Japanese law teachers and judges spend a year at Harvard and then rotate to Michigan and Stanford. One American law professor from each of these three institutions will visit Japan during this and the next academic years. Professor Joseph Dainow, of Louisiana State University described briefly how Professor Loussouarn was utilized with great satisfaction within the framework of the regularly scheduled courses of the current semester's offerings. Professor John N. Hazard of the Parker School of Foreign and Comparative Law reviewed their experience of utilizing foreign professors for regular courses, for special lecture series, and for participation in collaboration with a regular teacher.

Time did not permit the description of the exchange programs presently conducted at numerous other law schools, but a more comprehensive article will be published in the Journal of Legal Education, as well as Professor B. J. George's report on the foreign graduate students in American law schools.

JOSEPH DAINOW

COMMITTEE ON COMPARATIVE LAW: ASSOCIATION OF AMERICAN LAW SCHOOLS—A dinner meeting was held in Chicago on December 28, 1955, by the Comparative Law Committee of the Association of American Law Schools jointly with the Chicago Branch of the American Foreign Law Association, with Oliver Schroeder, Jr., Western Reserve University, in the chair. The program was: "Some Foreign Law Problems of United States Business." Heinrich Kronstein, Georgetown University, spoke on "Security for American Investments under the Principles of the Law of Argentina, Pakistan, and Germany"; Antonio R. Sarabia, president, AFLA Chicago Chapter, on: "The Subsidiary of an American Corporation in Foreign Countries as a Device of Representation of American Interests"; Paul Sayre, University of Iowa, on: "Corporate Reorganization Problems Revealed in Comparative Law Studies."

MADRID CONFERENCE OF THE COMITÉ MARITIME INTERNATIONAL—The Madrid Conference of the Comité Maritime International, held from September 18 to September 24, 1955, was attended by about 150 delegates from 19 countries: Argentina, Belgium, Canada, Denmark, Finland, France, Germany, Great Britain, Greece, Italy, Japan, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United States. Spanish maritime organizations, hosts of the C.M.I. for the first time, furnished magnificent nightly entertainment, as well as excursions. The working sessions were conducted by Albert Lilar, of Belgium, whose interchangeable French and English gracefully expedited the proceedings.

Main accomplishment was the agreement of 10 delegations (with only one negative vote albeit 7 abstentions) on a new text to replace the existing 1924 Convention on Limitation of Shipowners' Liabilities, substantially following the initial proposal of the British Maritime Law Association introduced and discussed at the Brighton meeting of the C.M.I. in 1954. The new text has these features: (1) the principle of limitation by abandonment of ship and cargo to the creditors is itself abandoned and wholly replaced by the forfeitary system which values the ship at a fixed sum per ton of her tonnage. The cargo forfeit is increased from £8 per ton to £24 per ton; the life forfeit is increased from £7 to £40 per ton. The money standard is to be expressed in Swiss gold francs. All vessels under 300 tons are to be treated as measuring 300 tons for limitation purposes.

The U.S.A. delegation alone voted "No," sticking to the forfeitary system of our 1851 Act as modified by the $60 fund for life claims created by the 1936 Morro Castle legislation. Abstainers were Den-

mark, Norway, Sweden, Portugal (ratifiers of the 1924 Convention), Italy, Greece, and Japan. The new text now goes to the Tenth Diplomatic Conference of Private Maritime Law.

If this effort is successful, the prospect is that the shipowners' limitations systems of the maritime world may for practical purposes be reduced to two: The Madrid-Brussels forfeitary value system and the U.S.A. abandonment system. If Britain and Europe adopt a life-claims fund of £64, the U.S.A. may feel itself challenged to increase the present $60 life-claims fund in some corresponding manner.

Three other projects were discussed at Madrid. The *Stowaway* problem seeks an orderly method of handling stateless persons who manage to stow themselves away for an international voyage and who, being denied the right to land at any port, sometimes become unwanted permanent inhabitants of the vessel. The *Marginal* Clause problem seeks to find a method of placing true and accurate "bad order" notations on bills of lading without destroying their utility as the "F" document in a CIF transaction. A resolution expressed the desire to explore the possibility of arriving at a Convention on *Passengers at Sea* similar to the passenger aspects of the Warsaw Aviation Convention.

The U.S.A. delegation, headed by Charles S. Haight, Jr., as president of the Maritime Law Association of the U.S., numbered 15 lawyers who took active parts in the proceedings. Their reports will become part of the proceedings of the M.L.A. in connection with its May 1956 meeting.

ARNOLD W. KNAUTH

HAGUE DIPLOMATIC CONFERENCE ON AIR LAW—A diplomatic conference, sponsored by the International Civil Aviation Organization, met at the Hague from September 6 to September 29, 1955, to consider the proposals of the Legal Committee of the International Civil Aviation Organization for amendments to the Warsaw Convention of 1929, ratified by most nations. An amendatory protocol was signed by 26 delegations. Great Britain and the United States withheld their signatures, pending consultation with their home authorities. The amended convention will come into force when 30 nations have ratified the protocol. Among the features of the protocol is an increase of the liability of the air carrier for a passenger killed or injured on an international flight to a maximum of 250,000 Poincare gold francs or $16,582. See *supra* pp. 78–97.

ANNOUNCEMENTS

FOURTH INTERNATIONAL CONGRESS ON SOCIAL DEFENSE—The International Association for Social Defense will hold its fourth congress at Milan, Italy, from April 2 to April 6, 1956. On the program is: Prevention of Crimes—Intentional and not Intentional—against the Person.

SIXTH INTERNATIONAL CONFERENCE OF THE LEGAL PROFESSION—The Sixth International Conference of the Legal Profession under the auspices of the International Bar Association will be held in Oslo, Norway, July 23–28, 1956, with Den Norske Sakførerforening as host organization. The subjects to be discussed in plenary sessions are: International Ship-Building Contracts; The Legal Profession; Administration of Foreign Estates; Sovereign Immunity in Tort and Contract; Double Taxation. Committee meetings will be on: Legal Aid; Immigration and Naturalization; International Judicial Co-operation; Human Rights; Enemy Property in Enemy-Occupied Territory; Foreign Divorces. Further information by the secretary general of the International Bar Association, 501 Fifth Avenue, New York 17, N. Y.

47TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION—The International Law Association will hold its

47th Conference at Dubrovnik, Yugoslavia, from August 26 to September 1, 1956, with the Yugoslav Branch as host organization. On the program are: Review of the United Nations Charter; The Uses of Waters of International Rivers; International Company Law; Air Law; International Monetary Law; Protection of Medical Services in Time of War; International Insolvency Law; Family Relations. Further information by the Hon. Secretary of the American Branch, Vanderbilt Hall, New York University, New York 3, N. Y.

COLLOQUIA OF THE INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE—The International Association of Legal Science will hold colloquia at Barcelona, Spain, from September 10 to September 17, 1956, with the Institute of Comparative Law of the Spanish Research Council as host organization. The topics of the symposia are: Problems of Reception of Foreign Law (India); The Rights of the Surviving Spouse; '*Audi alteram partem*' in Administrative Law; Legal Means to Promote Family Stability; Problems of Teaching Law. Experts from the United States National Committee (American Foreign Law Association) will participate in the colloquia.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW—The International Institute for the Unification of Private Law of Rome will hold a Colloquium on Methods for the Unification of Law at Barcelona, Spain, from September 17 to September 20, 1956.

HAGUE ACADEMY OF INTERNATIONAL LAW—The 1956 session of the Hague Academy of International Law will run from July 16 to August 11, 1956. The lectures will be in the fields of: History of International Law; Principles of Public International Law; Private International Law; and International Organization. The program may be obtained from the Secretariat, Peace Palace, The Hague.

IN MEMORIAM

ERNST RABEL*—The American Foreign Law Association deplores the loss of its honorary member, Ernst Rabel, who died on September 7, 1955, in Zürich at the age of 81 years.

Rabel was one of the great jurists of our time. He was born in Vienna, Austria, and had his legal training there. After further studies in France and Germany, he began in 1902 at the University of Leipzig his career as a law teacher. He taught successively at the Universities of Basle, Kiel, Göttingen, Munich, and Berlin, serving also as a judge in Basle and Munich. In Munich he started in 1916 an Institute of Comparative Law, the first in Germany. Ten years later he received a call to Berlin to become director of the newly established Kaiser Wilhelm Institut für ausländisches und internationales Privatrecht. He at once established the now well-known "*Zeitschrift*" of the Institute. He remained as the head of the Institute, which attained an international reputation under his guidance, until 1936 when he was dismissed by the Nazis.

As a result of efforts initiated by the American Law Institute, Rabel came to this country in 1939 and produced here, first under the auspices of the Institute and later under those of the Law School of the University of Michigan, the three volume "*Conflict of Laws: A Comparative Study.*" For this monumental work, he was awarded the Ames Prize by the Harvard Law Faculty. He had at the time of his death completed the manuscript for the fourth and final volume.

Known in this country, of which he became a citizen, primarily as the famous specialist in comparative conflict of laws, Rabel has made no less important contributions to other fields of the law, notably Roman law and the law of sales. His "*Recht des Warenkaufes,*" published in connection with work undertaken by

* This tribute was read at the October 21, 1955 meeting of the American Foreign Law Association in New York City by Kurt H. Nadelmann, member of the General Council.

the International Institute for the Unification of Private Law in Rome, has become the basic source book for work on unification of the law of international sales.

A "*Festschrift*" in two volumes, presented to Rabel on the occasion of his eightieth birthday, is testimony of the esteem and veneration of his many pupils and friends all over the world. His contribution to mutual understanding of differing legal systems has secured him a place among the citizens of the world. The American Foreign Law Association is proud to have been able to count him among its distinguished members.

ELEMÉR BALOGH,—Permanent Secretary-General of the International Academy of Comparative Law, died in Paris on September 3, 1955. Born in Bajmok, Hungary, July 24, 1881, he received the doctorate in law at the University of Budapest on November 23, 1903, and was admitted as a member of the bar of Budapest on June 8, 1906. Thereafter, during a period of eight years he visited a number of foreign universities, studying under the most celebrated scholars of the time in Italy, England, Austria, Germany, and France. These contacts with leading jurists throughout the world, Elemér Balogh developed and cultivated until the last days of his life.

Appointed professor at the University of Budapest, Professor Balogh had to flee to Vienna in 1919 at the time of the communist revolution, at the end of which he was recalled and appointed by the Ministry of Foreign Affairs to assist in the peace negotiations. From 1922 to 1928, he was professor of Roman and comparative law at the University of Kovno in Lithuania and thence went to the University of Berlin, where he lectured on comparative law at the Institute of Foreign Law. During 1932 and 1933, he visited a number of universities in the United States and Canada, but after returning to Berlin he was obliged to leave on account of the Hitler regime and found refuge in Paris. From 1938 to 1947, he taught at the University of Witwatersrand in Johannesburg, South Africa, and thereafter remained in Paris.

The late Professor Balogh gave lectures at a number of European universities, at the International Academy at The Hague (1936 and 1949), and at the University of Calcutta, where he delivered the Tagore Lectures in 1951. He published works in various languages dealing with a wide range of topics, including legal history, Roman law, international law, comparative law, aviation law, industrial law, Hungarian and Lithuanian law.

In addition to these varied scholarly activities, the chief interest of Professor Balogh was the International Academy of Comparative Law and the organization of the international congresses of comparative law, held under the auspices of the Academy in 1932 and 1937 (The Hague), 1950 (London), and 1954 (Paris). To each of these congresses, which have conspicuously served to promote international interest in comparative legal studies, his broad culture, penetrating humanism, and wide scholarly acquaintance were in full measure dedicated. The success of each of these congresses, achieved with most modest resources and despite the most varied difficulties, was primarily due to his efforts and enthusiasm, and gave him the deepest satisfaction. With his death, comparative law has lost one of its most devoted pioneers, of whom it could be said, as a distinguished jurist has remarked of the great scholar to whom tribute is also paid in these columns, that he too was one "dessen ruheloses Wanderdasein die grossen spätmittelalterlichen Humanistenfiguren aufleben lässt."[1]

H. E. YNTEMA

[1] M. Gutzwiller in 74 Zeitschrift für Schweizerisches Recht (1955) at p. 431.

AMERICAN FOREIGN LAW ASSOCIATION

Organized in New York on February 24, 1925[1], the American Foreign Law Association has as its objects: the advancement of the study, understanding, and practice of foreign, comparative, and private international law, the promotion of solidarity among members of the legal profession who devote themselves, wholly or in part, to those branches, the maintenance of adequate professional standards relative to such members, and active co-operation with learned societies devoted to such subjects.[2]

The Association, which has branches in Chicago and Miami, is the United States national committee of the International Association of Legal Science.

Active membership in the Association is open to any one of good moral character, who, besides manifesting a special interest in the objects of the Association, (a) has been duly admitted to practice before the Federal Supreme Court or the highest courts of a state, territory, or possession of the United States; or (b) is a member in good standing of the Bar of a foreign country, or who is otherwise specially qualified in any branches of law to which the Association is devoted.

The affairs of the Association are managed by a General Council elected as stated in the Constitution. The Council selects a president, two or more vice-presidents, a secretary, and a treasurer, who perform the duties implied by their respective titles for the Association as a whole as well as for the Council.

The General Council is composed of: Martin Domke, New York, George J. Eder, New York, Phanor J. Eder, New York, Victor C. Folsom, New York, David E. Grant, New York, Kurt H. Nadelmann, Cambridge, Mass., Max Rheinstein, Chicago, Ill., Otto Schoenrich, New York, Angelo Piero Sereni, New York, Harold Smith, New York, David S. Stern, Coral Gables, Fla., Arthur T. von Mehren, Cambridge, Mass., and the administrative officers.

Officers are: Otto C. Sommerich, New York, president; Alexis C. Coudert, New York, John N. Hazard, New York, Hessel E. Yntema, Ann Arbor, Mich., vice-presidents; Robert R. Boot, New York, treasurer; Albert M. Herrmann, One Wall Street, New York 5, N. Y., secretary.

[1] For the history of the Association, see 4 Am. J. Comp. L. (1955) 320.

[2] See Constitution, as revised, October 17, 1952, 2 Am. J. Comp. L. (1953) 294.

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